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Supreme Court, U.S.
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NO. (D) _____

IN THE UNITED STATES SUPREME COURT

ADVANTAGE MEDIA, L.L.C.,

Petitioner,

v.

CITY OF HOPKINS, MINNESOTA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether a plaintiff who obtains a preliminary injunction barring the continued enforcement of an unconstitutional municipal ordinance, followed by a permanent change in conduct by the municipality, is a prevailing party pursuant to 42 U.S.C. § 1988, even though the plaintiff does not ultimately prevail as to any other claims.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

The parties to this proceeding are properly set forth in the case caption. Petitioner Advantage Media, L.L.C. ("Advantage Media" or "Advantage") has no parent corporation and no publicly held company owns ten percent or more of the company's common stock.

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The published opinion of the three-judge panel of the Eighth Circuit Court of Appeals is reported as *Advantage Media, L.L.C. v. City of Hopkins*, 511 F.3d 833 (8th Cir. 2008).[1] The opinion of the district court denying Petitioner's Motion for Attorneys' Fees was unpublished, but was assigned a Westlaw cite at 2007 WL 270426 (D. Minn. Jan. 29, 2007). The district court's opinion granting Petitioner's Motion for Preliminary Injunctior is reported at 379 F. Supp. 2d 1030 (D. Minn. 2005).

JURISDICTION

The Court of Appeals entered judgment on January 8, 2008. The Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1291. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1988(b) of Title 42 of the United States Code states that "[i]n any action or proceeding to enforce a provision of [section 1983], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

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[1] The Appendix attached hereto includes the circuit court decision (1a-11a), the district court decision on fees (12a-21a), and the district court's injunction order (22a-54a).

STATEMENT

I. OVERVIEW OF THE CASE

Following the City of Hopkins' refusal to process four sign applications, Petitioner Advantage Media, L.L.C. ("Advantage") filed suit in December of 2004, alleging that the City's Sign Ordinance violated the First Amendment. (2a, 13a). On July 5, 2005, Petitioner filed a Motion for Preliminary Injunction seeking to enjoin enforcement of the Ordinance. (3a, 13a). After hearing oral argument from the parties, the district court issued a preliminary injunction. *Advantage Media, L.L.C. v. City of Hopkins*, 379 F. Supp. 2d 1030 (D. Minn. 2005) (13a, 22a-54a).

The district court held that Advantage succeeded in showing that the Sign Ordinance was content-based, could not satisfy strict scrutiny, and violated equal protection. 379 F. Supp. at 1038-43 (34a-52a). Moreover, the court held that "Plaintiffs have demonstrated a substantial likelihood of success that the remainder of the Sign Ordinance, Section 570 of the Hopkins Zoning Code, is unenforceable," and therefore enjoined the City from enforcing the entire Sign Ordinance. *Id.* at 1048 (52a-54a).

Closely following the issuance of the injunction, the City enacted an emergency interim ordinance on August 3, 2005. (3a). On August 16, 2005, the City adopted Ordinance No. 2005-955, which corrected the problems that had been identified by Advantage and recognized in the injunction order. (3a, 14a).

The City attempted to have the injunction order vacated based upon its passage of the new sign code, but the district court refused to undo the injunction. *Advantage Media, L.L.C. v. City of Hopkins*, 408 F. Supp. 2d 780, 788-90 (D. Minn. 2006).

Following the conclusion of the case, Advantage timely filed a very limited Motion for Attorneys' Fees and Costs on October 30, 2006. (4a). Advantage sought only a fraction of its total fees and costs, those that were directly necessary to obtain the preliminary injunction and change in conduct. (15a). On January 29, 2007, the district court entered an order denying Advantage's Motion for Attorneys' Fees on the ground that Advantage was not a prevailing party. (4a-5a). Advantage timely filed a Notice of Appeal. (5a). On January 8, 2008, the Eighth Circuit Court of Appeals affirmed the lower court's conclusion that Advantage was not a prevailing party. (1a-11a).

II. FACTUAL BACKGROUND OF THE CASE

Advantage is a limited liability company organized in the State of Minnesota for the purpose of erecting and operating signs to be used to advertise commercial and noncommercial topics. (23a). In November of 2004, Advantage submitted four sign application packages to the City of Hopkins. (24a). The City refused to accept the applications for processing, despite Advantage's repeated requests. *Id.* On December 4, 2004, the application packages were returned without action to Advantage. *Id.* As a result of the City's refusal to accept and process the applications, Advantage filed

suit against the City alleging its Sign Ordinance was unconstitutional. (13a).

On July 29, 2005, the district court granted Advantage's Motion for Preliminary Injunction, and enjoined the continued enforcement of the Sign Ordinance. *Advantage Media, L.L.C. v. City of Hopkins*, 379 F. Supp. 2d 1030, 1048 (D. Minn. 2005) (22a-54a). Based entirely upon the injunction order, the City enacted an emergency interim ordinance on August 3, 2006 to control signs until the City adopted a new sign code. *See* Ordinance No. 2005-954 (describing issuance of injunction and stating "[a]s a result of the injunction, Hopkins is without any regulation regarding signs") (Exh. B to Dkt. No. 26). On August 16, 2005, the Hopkins City Council repealed the Sign Ordinance (Section 570 of the Zoning Code) and the interim ordinance and enacted Ordinance No. 2005-955, which regulated signs. *See* Resolution No. 2005-75 (Exh. C to Dkt. No. 26); Ordinance No. 2005-956 (Exh. D to Dkt. No. 26); Ordinance No. 2005-955 (Exh. E to Dkt. No. 26). In August of 2005, the Hopkins City Council repeatedly adopted the following language:

> [a] lawsuit has been filed against the City of Hopkins (Advantage Media, L.L.C., et al. v. City of Hopkins, U.S. Dist. Ct. File No. 04-04959, hereinafter the "Lawsuit") challenging the constitutionality of the Sign Ordinances. On July 29, 2005, U.S. District Court Judge Michael Davis issued a preliminary injunction in the Lawsuit preventing Hopkins from

> enforcing the Sign Ordinances while the injunction is in place.

Id. These documents also stated "[a]s a result of the injunction, Hopkins is without any regulation regarding signs." *See* Ordinance No. 2005-954 (Exh. B to Dkt. No. 26). Thus, it is undeniable that as a result of the injunction order in Advantage's favor, the City adopted new sign regulations aimed at correcting the constitutional problems identified by Advantage.

III. PROCEEDINGS BELOW

On December 8, 2004, Advantage filed suit against Hopkins, alleging that the City's Sign Ordinance violated the First Amendment. (13a). On July 5, 2005, Petitioner filed a Motion for Preliminary Injunction seeking to enjoin enforcement of the Ordinance. (13a). After hearing oral argument from the parties on July 27, 2005, the district court issued a preliminary injunction. 379 F. Supp. 2d at 1048 (13a). The district court held that Advantage had succeeded in showing that the Sign Ordinance was unconstitutional. *Id.* at 1038-43 (34a-52a). Moreover, the court enjoined the City from enforcing the entire Sign Ordinance. *Id.* at 1048 (52a-54a).

Rather than appeal the injunction order, the City enacted an emergency interim ordinance on August 3, 2006 and a new sign code on August 16, 2005. (3a; 14a). The new ordinance corrected the problems that had been pointed out by Advantage and recognized by the lower court. (3a).

On August 8, 2005, Advantage filed its Motion for Partial Summary Judgment. (3a). The City filed its Motion for Summary Judgment on August 19, 2005. (3a). On January 5, 2006, the district court denied Advantage's motion and granted in part the City's Motion. *Advantage Media, L.L.C. v. City of Hopkins*, 408 F. Supp. 2d 780 (D. Minn. 2006). (4a, 14a). The court refused to undo its earlier injunction order. *Id.* at 788-90 (refusing to revisit prior holdings on injunctive relief). The court also denied the City's request to dismiss Advantage's claims for damages and fees and set the case for a jury trial on the issue of damages. *Id.* at 796-97. (4a).

After a two-day trial on the issue of causation and damages, the jury found in favor of the City. (4a). Thereafter, Advantage filed a very limited Motion for Attorneys' Fees and Costs seeking only the fees and costs necessitated by the City's initial refusal to change its sign regulations. *Id.* The City subsequently filed a competing Motion for Attorneys' Fees and supporting documentation. *Id.* On January 29, 2007, the district court denied Advantage's motion on the ground that Advantage was not a prevailing party. (4a-5a, 12a-21a). The court also denied the City's fee request. *Id.* Advantage appealed. (2a).

REASONS FOR GRANTING THE PETITION

The Eighth Circuit's decision has created a split among the circuit courts with regard to whether a litigant who obtains an injunction that forces a change in governmental conduct, rather than merely maintaining the status quo, qualifies as a prevailing party for the purposes of 42 U.S.C. § 1988. The Eighth Circuit's conclusion that Advantage's success in obtaining an enforceable injunction order, which prevented the continued enforcement of an unconstitutional sign ordinance, failed to confer prevailing party status is contrary to recent decisions of the Fifth, Ninth, Eleventh, and District of Columbia Circuit Courts. Each of those courts has held that court-ordered injunctions that do more than merely maintain the status quo are sufficient to convey prevailing party status. The Eighth Circuit's holding to the contrary has created a split among the circuits that should be addressed by this Court.

This petition should also be granted to address the Eighth Circuit's apparent resurrection of the "central issue" test. In determining whether Advantage was a prevailing party, the Eighth Circuit focused almost exclusively on whether Advantage was able to erect its proposed signs as a result of this litigation. Since Advantage never erected the signs it applied for, the Eighth Circuit reasoned it was not a prevailing party. This Court has previously determined that focusing on a litigant's central concern when determining prevailing party status is improper. As such, the Eighth Circuit's reliance on this principle should be addressed.

Granting this Petition will also allow this Court to clarify whether its decision in *Buckhannon*

Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources, 532 U.S. 598 (2001), stands for the proposition that a party who obtains a judicially sanctioned change in the legal relationship through the issuance of a court order, followed by a permanent change in challenged conduct, qualifies as a prevailing party under 42 U.S.C. § 1988.

Finally, granting this Petition will allow this Court to answer the question it specifically left unanswered in *Sole v. Wyner*, 127 S. Ct. 2188, 2196 (2007), namely "whether, in the absence of a final decision on the merits . . . success in gaining a preliminary injunction may sometimes warrant an award of counsel fees."

I. THE EIGHTH CIRCUIT'S DECISION CREATES A SPLIT AMONG THE CIRCUITS AS TO WHETHER A PRELIMINARY INJUNCTION ORDER FOLLOWED BY A CHANGE IN GOVERNMENT CONDUCT CONVEYS PREVAILING PARTY STATUS.

This Court has held that the term "prevailing party" should be "generously" interpreted so as to allow litigants to recover fees if "they succeed on any significant issue in litigation which achieves some of the benefit [that was sought] in bringing the suit." *Farrar v. Hobby*, 506 U.S. 103, 109 (1992); *also Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 790 (1989) (holding that a prevailing party is one who "has prevailed on an important matter in the course of litigation, even when he does not ultimately prevail on all issues"); *Hensley v.*

Eckerhart, 461 U.S. 424, 433 (1983). Circuit courts have necessarily followed suit. *E.g.*, *Southworth v. Board of Regents of Univ. of Wisc. Sys.*, 376 F.3d 757, 767-68 (7th Cir. 2004); *Balark v. City of Chicago*, 81 F.3d 658, 663-65 (7th Cir. 1996); *Head v. Medford*, 62 F.3d 351, 354 (11th Cir. 1995); *Hendrickson v. Branstad*, 934 F.2d 158, 161-62 (8th Cir. 1991) (parties "may be considered 'prevailing parties' for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing the suit").

Moreover, this Court has held that *any* enforceable order, no matter how limited, affords civil rights plaintiffs the ability to recover the attorney fees incurred in bringing suit. *Hewitt v. Helms*, 482 U.S. 755, 760 (1987). As this Court noted in *Garland*,

> If the plaintiff has succeeded on "any significant issue in litigation which achieve[d] some of the benefit the parties sought in bringing suit," the plaintiff has crossed the threshold to a fee award of some kind . . . . Thus, at a minimum, to be considered a prevailing party within the meaning of §1988, the plaintiff must be able to point to a resolution of the dispute, which changes the legal relationship between itself and the defendant . . . . The touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties in a manner, which Congress sought to promote in the fee statute. Where such a change

> has occurred, the degree of the plaintiff's overall success goes to the reasonableness of the award under *Hensley* [*v. Eckerhart*, 461 U.S. 424 (1983)], not to the availability of a fee award vel non.

489 U.S. at 791-93. The "change in legal relationship" standard for determination of prevailing party status is not new. Circuit courts have consistently analyzed preliminary injunctions to determine whether the injunction merely preserved the status quo (thereby only scoring a "procedural" victory) or gave the plaintiff a benefit sought in the litigation so as to confer prevailing party status. *Compare Smalbein v. City of Daytona Beach*, 353 F.3d 901, 905 (11th Cir. 2003) (plaintiffs entitled to attorneys' fees because court ordered relief and retained jurisdiction to enforce relief, even though case was voluntarily dismissed with prejudice), *and LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1160-61 (9th Cir. 2000) (temporary restraining order, which prohibited public officials from interfering with exhibition containing non-obscene erotic art, was sufficient to confer prevailing party status), *and Ketterle v. B.P. Oil, Inc.*, 909 F.2d 425, 429 (11th Cir. 1990) (preliminary injunction sufficient to confer prevailing party status), *with Northern Cheyenne Tribe v. Jackson*, 433 F.3d 1083, 1086-87 (8th Cir. 2006) (status quo injunction insufficient to confer prevailing party status), *and Markham v. International Ass'n of Bridge, Structural & Ornamental Iron Workers*, 901 F.2d 1022 (11th Cir. 1990) (preliminary injunction insufficient to confer prevailing party status because injunction did not

change the legal relationship between the parties but rather preserved status quo).

Circuit courts have consistently held that when an injunction goes beyond the preservation of the status quo, a plaintiff becomes a prevailing party for purposes of Section 1988. *E.g.*, *Southworth*, 376 F.3d at 767-68; *Role Models Am., Inc. v. Brownlee*, 353 F.3d 962, 966 (D.C. Cir. 2004) (prevailing party recognized where preliminary injunction brought "a change in someone's primary conduct in the real world . . . [such as by the] imposition of a restriction on others") (citation omitted); *Murphy v. Fort Worth Indep. Sch. Dist.*, 334 F.3d 470, 471 (5th Cir. 2003); *LSO*, 205 F.3d at 1160-61 (TRO sufficient to confer prevailing party status); *Taylor v. City of Ft. Lauderdale*, 810 F.2d 1551, 1558 (11th Cir. 1987) (grant of a preliminary injunction on the merits, as opposed to temporary relief maintaining the status quo, entitles one to prevailing party status); *Virdi v. DeKalb County Sch. Dist.*, 2007 WL 330805, at *3-4 (11th Cir. Feb. 6, 2007) (unpublished decision); *also Select Milk Producers, Inc. v. Veneman*, 304 F. Supp. 2d 45 (D.D.C. 2004) (prevailing party status afforded where preliminary injunction created "material alteration in the legal relationship between the parties"), *aff'd in part, rev'd in part, on other grounds and remanded*, 400 F.3d 939 (D.C. Cir. 2005).

Despite this substantial body of case law, the Eighth Circuit concluded that Advantage was not a prevailing party. (8a-10a). The Eighth Circuit's conclusion that a party like Advantage is not a prevailing party under Section 1988, even though they received a comprehensive injunction order that went far beyond maintaining the status quo, is in sharp contrast to decisions from the Fifth, Seventh,

Ninth, Eleventh, and D.C. Circuits. Thus, as a result of the Eighth Circuit's opinion, a dangerous split now exists as to whether a party which obtains injunctive relief that changes the legal relationship between the parties is a prevailing party under 42 U.S.C. § 1988.

The seriousness of the split can be seen by comparing the Eighth Circuit's result here with opinions recently issued under similar circumstances by the Eleventh, Seventh, and Ninth Circuits. In *Virdi*, for example, the Eleventh Circuit reviewed whether a party that obtained injunctive relief qualified as a prevailing party. 2007 WL 330805, at *1-2. Even though the plaintiff, like Advantage, obtained an order enjoining the continued enforcement of the regulation in question, the district court held that the legal relationship between the plaintiff and defendant had not changed, nor had the plaintiff directly benefited from the injunction that was issued. *Id.* at *2. On appeal, the Eleventh Circuit reversed, holding that the plaintiff was a prevailing party because he obtained relief on the merits of his claim for injunctive relief. *Id.* at *3. The court summarized by stating,

> Virdi challenged a program that gave a preference to African-American firms applying for architectural contracts with the defendants. We held that program unconstitutional. Virdi now no longer faces the obstacle of the unconstitutional preference. Should he bid for contracts with the defendants in the future, he will be considered on a level playing field . . . . Virdi has therefore directly benefited from the

> injunction, which obviously changed the legal relationship between him and the defendants by prohibiting the defendants, under penalty of contempt, from applying an unconstitutional racial preference to Virdi's bids.

Id. The Eleventh Circuit also noted that the nature of the relief afforded the plaintiff also militated in favor of granting the plaintiff prevailing party status because "[a]n injunction is not lightly entered." *Id.* at *4.

In similar circumstances in *Southworth*, the Seventh Circuit affirmed the district court's award of attorneys' fees and costs to a plaintiff that achieved limited success. 376 F.3d at 766-72. The Seventh Circuit found that the plaintiffs were prevailing parties because they "obtained a court ruling in the district court that the mandatory fee system violated the principle of viewpoint neutrality, and in response to the district court's order, the University adopted the detailed procedures, criteria, and appeals process governing funding decisions." *Id.* at 768. The Seventh Circuit found that such conduct resulted from the court-ordered change in the legal relationship between the parties. *Id.* Advantage obtained a ruling that the Hopkins Sign Ordinance was unconstitutional and, in response, the City replaced its Sign Ordinance to correct the identified problems. Thus, under the Seventh Circuit's reasoning in *Southworth*, Advantage is a prevailing party that is entitled to some award of attorneys' fees and costs.

Likewise, in *Watson v. County of Riverside*, 300 F.3d 1092 (9th Cir. 2002), the Ninth Circuit held

that a party that obtained a preliminary injunction was a prevailing party under Section 1988 even though the plaintiff was not ultimately successful at the conclusion of the case. 300 F.3d at 1095-96. There, the court explained:

> We conclude that by obtaining the preliminary injunction appellees "prevailed on the merits of at least some of (their) claims" . . . . The preliminary injunction prevented appellants from continued enforcement of their original guidelines, which is precisely the relief appellees sought. Appellees succeeded on a "significant issue in litigation, which achieve(d) . . . the benefit the parties sought in bringing suit."

Id. at 1095. The Ninth Circuit continued, explaining, "[h]aving succeeded in winning a preliminary injunction . . . Watson obtained significant, court-ordered relief that accomplished one of the main purposes of his lawsuit. This is so even though he failed to prevail on his other claims." *Id.* at 1096.

Here, the district court's order granting Advantage's request for a preliminary injunction was clearly an enforceable order that changed the legal relationship of the parties. The injunction order did not maintain the status quo, but rather forced a material change in the relationship between Advantage and the City because the City was prevented from continuing to enforce an unconstitutional Sign Ordinance. Indeed, the City conceded that the injunction deprived it from having any enforceable sign regulations. *See* Ordinance No.

2005-954 ("[a]s a result of the injunction, Hopkins is without any regulation regarding signs") (Exh. B to Dkt. No. 26). But for the injunction, the City would have continued to enforce its invalid restrictions on speech. Indeed, it had continued to do so for over eight months following the filing of the Complaint.

Based on the injunction, the City took prompt action to correct the constitutional defects pointed out by Advantage. Thus, Advantage, having achieved relief by virtue of the injunction and the City's passage of a new sign code, is a prevailing party for the limited purpose of obtaining partial reimbursement of its fees and costs under 42 U.S.C. § 1988. *Hopkins*, 408 F. Supp. 2d at 794 (noting that City not free to return to its previous ways as a result of the injunction). Under *Virdi*, *Southworth*, and *Watson*, Advantage would undoubtedly have been found to be a prevailing party entitled to an award of fees and costs. However, under the analysis used by the Eighth Circuit, Advantage was found **not** to be a prevailing party. Given the disparity between the approach taken by the Eighth Circuit and the approaches taken by the Eleventh, Seventh, and Ninth Circuits under very similar circumstances, this Petition should be granted to address this split.

II. THE EIGHTH CIRCUIT'S USE OF THE "CENTRAL ISSUE" TEST TO DETERMINE ADVANTAGE WAS NOT A PREVAILING PARTY WARRANTS REVIEW.

In affirming the district court's denial of Advantage's request for attorneys' fees, the Eighth

Circuit, on several occasions, focused on what it felt were Advantage's goals in bringing this litigation. For example, the circuit court surmised that Advantage "filed suit to erect its signs in Hopkins, to obtain damages for violation of its constitutional right to free speech, and to enjoin the city from enforcing a purportedly unconstitutional ordinance." (8a). Then, the court proceeded to focus almost entirely on what Advantage did not accomplish during this litigation. *Id.* ("Advantage obtained no relief in respect to its first goal"); *id.* at 9a (noting Advantage failed to obtain damages); *id.* at 10a (again noting Advantage failed to obtain permission to erect its signs).

Indeed, the court placed great emphasis on the fact that nothing in the preliminary injunction established that Advantage could build the billboards for which it applied. (9a). Relying on the Eleventh Circuit's decision in *Granite State Outdoor Advertising, Inc. v. City of St. Peterbsurg*, 348 F.3d 1278 (11th Cir. 2003), the Eighth Circuit noted "[t]he signs Advantage sought to erect have never been built, and it is no closer to erecting its billboards than it was when the litigation began." (8a-9a).[2]

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[2] Substantively, the Eighth Circuit's reliance on *St. Petersburg* is misplaced. The Eleventh Circuit in *St. Petersburg* was not faced with the question of whether a party which obtained a preliminary injunction but ultimately did not succeed at trial was a prevailing party, but rather dealt with a party whose facial challenge, while initially successful, was reversed on appeal. 348 F.3d at 1283-84. Given that the plaintiff in *St. Petersburg* did not obtain an injunction order in its favor that prompted a change in behavior by the defendant, the Eighth Circuit's extension of the Eleventh Circuit's holding to the disparate facts of this case was erroneous.

As noted above, obtaining the signs it applied for was not the only goal of Advantage in commencing this lawsuit, but rather Advantage sought from the beginning injunctive relief to prevent further enforcement of the City's unconstitutional Sign Ordinance. See Amended Complaint, p. 1 (entitled "Request for Injunctive Relief"), ¶¶ 43, 48, 52, 56, 62, 66, 70, 74, 79, 83, 87, 99, 101-107 (specific count for injunctive relief), p. 32 (requesting injunctive relief) (Dkt. No. 3). While the Eighth Circuit acknowledges that Advantage sought injunctive relief, it glosses over this success and focuses on Advantage's lack of success as to other claims, all of which came **after** the issuance of the injunction. The court's focus on Advantage's central concern in determining whether it was a prevailing party is contrary to this Court's opinion in *Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782 (1989).

In *Garland*, this Court held that it is entirely irrelevant what a party's "central concern" is in bringing an action. 489 U.S. at 791. In rejecting the "central issue" test, which the Eighth Circuit appears to have resurrected here, this Court noted,

> Nor does the central issue test have much to recommend it from the viewpoint of judicial administration of § 1988 and other fee shifting provisions. By focusing on the subjective importance of an issue to the litigants, it asks a question which is almost impossible to answer. Is the "primary relief sought" in a disparate treatment action under Title VII reinstatement,

> backpay, or injunctive relief? This question, the answer to which appears to depend largely on the mental state of the parties, is wholly irrelevant to the purposes behind the fee shifting provisions, and promises to mire district courts entertaining fee applications in an inquiry which two commentators have described as "excruciating." *See* M. Schwartz & J. Kirklin, *Section 1983 Litigation: Claims, Defenses, and Fees* § 15.11, p. 348 (1986). Creating such an unstable threshold to fee eligibility is sure to provoke prolonged litigation, thus deterring settlement of fee disputes and ensuring that the fee application will spawn a second litigation of significant dimension. In sum, the search for the "central" and "tangential" issues in the lawsuit, or for the "primary," as opposed to the "secondary," relief sought, much like the search for the golden fleece, distracts the district court from the primary purposes behind § 1988 and is essentially unhelpful in defining the term "prevailing party."

Id. This holding has been widely acknowledged by numerous circuit courts of appeal. *E.g., Mercer v. Duke Univ.*, 401 F.3d 199, 205 (4th Cir. 2005) (noting "the Court in *Garland* made it clear that the subjective motives of the plaintiff are not relevant to determining whether the plaintiff is a prevailing party"); *LeBlanc-Sternberg v. Fletcher*, 143 F.3d 748,

757 (2nd Cir. 1998) (same); *Stivers v. Pierce*, 71 F.3d 732, 751 (9th Cir. 1995) (litigant need not prevail on every issue, or even on central issue in case, to be considered "prevailing party," but rather, it is enough that he succeed on any significant claim affording some of relief sought); *Krichinsky v. Knox County Schools*, 963 F.2d 847, 850 (6th Cir. 1992) (reversing the district court's decision to focus on the central issue of plaintiff in bring action); *Shipes v. Trinity Industries, Inc.*, 883 F.2d 339, 343 (5th Cir. 1989) ("In *Garland*, the Court rejected this circuit's rule that in order to be a 'prevailing party,' entitled to fees under sec. 1988, the plaintiff must prevail on the issue central to their case"); *Virdi*, 2007 WL 330805, at *5 (finding "it is also entirely irrelevant what [the plaintiff's] central concern was" when evaluating whether a plaintiff is a prevailing party).

Therefore, the Eighth Circuit's decision to focus on what it perceived to be Advantage's main concern in bringing this action in order to determine whether it was a prevailing party is contrary to *Garland* and numerous precedents from other courts of appeal. Thus, Advantage's Petition should be granted.

III. AS AN INJUNCTION ORDER WAS THE "CATALYST" FOR THE CITY'S CHANGE IN CONDUCT, ADVANTAGE IS DUE AN AWARD OF FEES.

Advantage's Petition should also be granted to clarify this Court's holding in *Buckhannon* with respect to the catalyst theory. It cannot be seriously disputed that the City's passage of a new sign code in August of 2005 was a direct result of the lower

court's issuance of an injunction order in favor of Advantage. *E.g.*, Ordinance No. 2005-954 (stating "[a] lawsuit has been filed against the City of Hopkins . . . challenging the constitutionality of the Sign Ordinances. On July 29, 2005, U.S. District Court Judge Michael Davis issued a preliminary injunction in the Lawsuit preventing Hopkins from enforcing the Sign Ordinances while the injunction is in place") (Exh. B to Dkt. No. 26); Resolution No. 2005-75 ("the City Council hereby resolves that the lack of a comprehensive, constitutionally sound ordinance regulating signs in the City of Hopkins constitutes an emergency and adopts and approves [the new sign regulations]") (Exh. C to Dkt. No. 26); Ordinance No. 2005-955 (Exh. D to Dkt. No. 26); Ordinance No. 2005-956 (Exh. E to Dkt. No. 26). Given that the City's change in conduct was in response to an order in Advantage's favor, under this Court's holding in *Buckhannon*, Advantage is due an award of attorneys' fees.

Prior to the year 2000 and this Court's decision in *Buckhannon*, the City's change in conduct alone would have meant that Advantage's fees and costs were to be awarded without further analysis. *E.g.*, *Hewitt v. Helms*, 482 U.S. 755 (1987). This Court's decision in *Buckhannon* changed the analysis somewhat but not the proper result with respect to this case.

In *Buckhannon*, the Court did reject the pure catalyst theory, holding instead that a judicially sanctioned change in the legal relationship of the parties was necessary for an award of fees. 532 U.S. at 610. The injunction awarded Advantage in this case unquestionably satisfies this Court's requirement of a judicially sanctioned change, as the

injunction created a mandatory duty upon the City of Hopkins to cease enforcement of its Sign Ordinance, a violation of which would have been sanctionable by contempt from the trial court. 408 F. Supp. 2d at 734. The order thus clearly constituted a judicially sanctioned change in the legal relationship of the parties. When an order is joined with a change in conduct, the catalyst theory undeniably lives on. In light of the injunction order and the City's new sign code, *Buckhannon* affirmatively supports an award of fees and costs to Advantage.

Such a result has been recognized by several circuit courts of appeal following *Buckhannon*. *E.g.*, *Select Milk Producers, Inc. v. Johanns*, 400 F.3d 939, 945 (D.C. Cir. 2005); *Palmetto Props. v. County of DuPage*, 375 F.3d 542, 547-52 (7th Cir. 2004); *Maine Sch. Admin. Dist. No. 35 v. Mr. R.*, 321 F.3d 9, 15-16 (1st Cir. 2003); *Dubec v. Green Oak Township*, 312 F.3d 736, 753, 754, n.8 (6th Cir. 2002). In *Select Milk*, for example, the circuit court held,

> Although *Buckhannon* decisively rejected the "catalyst theory," the Court clearly did not adopt a rule that plaintiffs could only be deemed "prevailing parties" for fee-shifting purposes if they obtained a final judgment on the merits of a suit.
>
> In short, the holding in *Buckhannon* embraces the possibility that, under certain circumstances, a preliminary injunction, like a consent decree, may result in a court-ordered change in the legal relationship between the parties that is sufficient to make the

> plaintiff a "prevailing party" under a fee-shifting statute . . . . Therefore, *Buckhannon* surely does not endorse a *per se* rule that a preliminary injunction can never transform a party in whose favor the injunction is issued into a "prevailing party" . . . .

400 F.3d at 945; *see also Dubuc*, 312 F.3d at 753 (acknowledging *Buckhannon's* rejection of the catalyst theory, but holding that preliminary injunctions can support prevailing party status where the relief afforded was not merely procedural); *Palmetto Props.*, 375 F.3d at 547-52 (analyzing *Buckhannon* and finding that county's repeal of unconstitutional provision that resulted in dismissal for mootness did not deprive plaintiff of prevailing party status).[3]

Under the circumstances of this case, where it is clear that the City of Hopkins did not stop enforcing its former Sign Ordinance voluntarily, but as a result of the court-ordered injunction, Advantage is due the small fraction of its fees as requested. Granting this Petition will allow the Court to clarify the holding in *Buckhannon* for situations where a litigant obtains an initial order

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[3] *Environmental Protection Info. Ctr., Inc. v. Pacific Lumber Co.*, 229 F. Supp. 2d 993, 1004 (N.D. Cal. 2002) (despite dismissal of action for mootness following initial injunctive relief, plaintiffs were prevailing parties because, "Defendants did not stop logging voluntarily, but as a result of the court-issued TRO" . . . . Thus, plaintiffs' efforts resulted in a court-ordered change in the relationship between the parties, supporting compensation under *Buckhannon*) (citation omitted), aff'd, 103 Fed. Appx. 627 (9th Cir. 2004).

followed by a change in behavior, but does not ultimately prevail on other claims.

IV. GRANTING THIS PETITION WILL ALLOW THIS COURT TO ANSWER UNRESOLVED QUESTIONS FROM *SOLE V. WYNER*.

Granting Advantage's Petition is also important because it will allow this Court the opportunity to resolve questions that remained unanswered following this Court's recent opinion in *Sole v. Wyner*. In *Sole*, the Court held that "[p]revailing party status . . . does not attend achievement of a preliminary injunction that is reversed, dissolved, or otherwise undone by the final decision in the same case." 127 S. Ct. at 2196. However, this Court made it clear that the question of "whether, in the absence of a final decision on the merits . . . success in gaining a preliminary injunction may sometimes warrant an award of counsel fees." *Id.*

Despite this Court's acknowledgement that its holding in *Sole* was not applicable in cases such as this one, the Eighth Circuit nevertheless attempted to fit the facts of this case into *Sole's* narrow holding. (10a-11a). Most importantly, the Eighth Circuit's conclusion that the jury's final verdict in this case reversed the effect of the preliminary injunction that was issued to Advantage could not be more erroneous.

In *Sole*, the preliminary injunction was undone by the lower court's final decision denying the plaintiff's request for a permanent injunction against the same ordinance that was preliminarily

enjoined. *Id.* at 2193. Here, however, the preliminary injunction was not undone by the district court's decision on summary judgment, nor the jury's ultimate verdict. Even now, Hopkins cannot go back to its former ways. *Hopkins*, 408 F. Supp. 2d at 794. Moreover, in contrast to the injunction in *Sole* – which was issued at a hearing the day after the complaint was filed in the case – the injunction here was issued over eight months after the filing of Advantage's Complaint. This distinction is key because this Court placed great emphasis on the timing of the hearing in *Sole*. 127 S. Ct. at 2195. Given the distinctions between this case and the facts of *Sole*, the Eighth Circuit's attempt to fit this case into the *Sole* mold should be revisited.

The post-*Sole* question of whether, in the absence of a final decision on the merits, success in gaining a preliminary injunction may sometimes warrant an award of counsel fees has recently been answered in the affirmative by several district courts. *E.g.*, *Oregon Natural Desert Ass'n v. Lohn*, 522 F. Supp. 2d 1295, 1298-99 (D. Or. 2007) (plaintiffs entitled to fees where they obtained initial ruling followed by corrective action and finding of mootness); *Gamble v. Ohio Department of Job & Family Servs.*, 2007 WL 3046492, *3 (S.D. Ohio Oct. 16, 2007) (plaintiffs were prevailing parties with respect to injunction when defendant amended rule to address concerns raised in injunction order); *Californians for Alternatives to Toxics v. United States Forest Serv.*, 2007 WL 2993132, *4 (E.D. Cal. Oct. 11, 2007) ("[t]he court's injunction required an action from the defendants that they otherwise were

not required to perform. Consequently, the plaintiffs were the prevailing parties").

Similarly, Advantage's success as to the injunction necessitated that the City of Hopkins suspend the enforcement of its Sign Ordinance. This victory was not undone on the merits, but rather was vindicated by the City's decision to adopt a new sign code that addressed the constitutional flaws. The Eighth Circuit's application of *Sole* to the disparate facts of this matter was erroneous, particularly in light of the fact that this Court explicitly stated that is was leaving the question of whether, in the absence of a final decision on the merits, success in gaining a preliminary injunction may sometimes warrant an award of counsel fees unanswered.

CONCLUSION

The lower court's issuance of a comprehensive injunction order in favor of Advantage qualifies Advantage as a prevailing party under 42 U.S.C. § 1988. The order in Advantage's favor went beyond the preservation of the status quo and affirmatively prevented the City of Hopkins from enforcing an unconstitutional ordinance. Under established precedent in a majority of the circuit courts of appeal, such a result unquestionably qualifies a litigant as a prevailing party that is entitled to a fee award. In the Eighth Circuit, however, accomplishing such injunctive relief is a hollow victory indeed, unless a litigant ultimately succeeds as to other claims. Thus, the result reached by the Eighth Circuit is contrary to the holdings of this Court and has created a split among the circuit courts that must be addressed.

This petition should also be granted based on the fact that the Eighth Circuit apparently resurrected the "central issue" test in denying Advantage's fee request. Allowing the circuit court's decision to stand would resuscitate a legal theory that this Court overruled almost twenty years ago.

Advantage is also a prevailing party based on the fact that it obtained an order in its favor that was followed by corrective action on the part of the City. Thus, under *Buckhannon*, Advantage, having achieved the injunction and the City's passage of a new sign code, is a prevailing party for the limited purpose of obtaining partial reimbursement for its fees and costs under 42 U.S.C. § 1988.

Finally, granting this Petition will allow the Court to address questions it left unanswered in *Sole*. The Eighth Circuit's attempt to rely on *Sole* to resolve this case, even though this Court expressly limited its application, illustrates the need for additional guidance as to whether the issuance of a preliminary injunction can sometimes be sufficient to convey prevailing party status upon a litigant.

WHEREFORE, Petitioner Advantage Media, L.L.C. respectfully requests that this Petition be GRANTED.

DATED this 4th day of April, 2008.

Respectfully submitted,

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United States Court of Appeals
Eighth Circuit

ADVANTAGE MEDIA, L.L.C., Plaintiff-Appellant,

v.

CITY OF HOPKINS, MN, Defendant-Appellee.

No. 07-1441.

Submitted: Nov. 14, 2007.
Filed: Jan. 8, 2008.

Edward A. Webb, argued, Atlanta, GA, for appellant. Paul D. Reuvers, argued, Bloomington, MN, Jason J. Kuboushek, on the brief, Bloomington, MN, for appellee.

Before MURPHY, HANSEN, and GRUENDER Circuit Judges.

MURPHY, Circuit Judge.

Advantage Media (Advantage) submitted permit applications for the construction of four large billboards to the city of Hopkins, Minnesota ("the city"). The city declined to process the applications, and Advantage brought an action pursuant to 42 U.S.C. § 1983 claiming that the city's sign code was unconstitutional under the First and Fourteenth Amendments and that the city violated its constitutional rights by denying the applications. The district court[1] granted Advantage's motion for a preliminary injunction to halt the enforcement of the

[1] The Honorable Michael J. Davis, United States District Judge for the District of Minnesota.

sign code, but the trial jury awarded no damages to Advantage and the district court denied its motion for attorney fees for procuring the preliminary injunction. Advantage now appeals the district court's determination that it was not a prevailing party under 42 U.S.C. § 1988. We affirm.

I.

Advantage is a Minnesota company that develops and operates advertising signs for commercial and noncommercial purposes. Hopkins is a suburban community of more than 17,000 residents located approximately thirteen miles from Minneapolis. On November 23, 2004 Advantage submitted applications to the city to erect four 672 square foot billboards containing trivision technology. A trivision billboard consists of four or six inch vertical slats which rotate on a timer to display only one message at a time; each side of a billboard is capable of displaying three messages for a total of six messages per billboard.

Hopkins regulates the signs built in the city through its sign ordinance. The authorized city official refused to accept Advantage's applications for processing despite its repeated requests. Advantage asked for a written explanation, but the official refused. In spite of the city's refusal, Advantage left the applications with the official for processing. On December 4, 2004 the city returned the unprocessed applications by mail with a note stating only that the city was returning the applications. Advantage filed suit against the city on December 8, 2004 in the District of Minnesota, alleging that its sign ordinance violated various constitutional provisions including the First Amendment. The complaint

included allegations that the ordinance was unconstitutional on its face and as applied to Advantage and that the ordinance impermissibly favored commercial speech over noncommercial speech. On January 21, 2005 the city sent Advantage a letter stating it rejected the applications because the proposed signs violated the ordinance provisions regulating the size of signs. The largest signs permitted anywhere in the city under the sign ordinance were 250 square feet.

On July 5, 2005 Advantage filed a motion for a preliminary injunction to enjoin enforcement of the ordinance. The district court issued a preliminary injunction on July 29, 2005. *Advantage Media, L.L.C. v. City of Hopkins*, 379 F. Supp. 2d 1030, 1048 (D. Minn. 2005) (*Advantage I*). It determined that the constitutionally suspect ordinance provisions were so pervasive that they could not be severed; the district court therefore enjoined enforcement of the entire ordinance. *Id.* at 1047-48. In response to the injunction the city enacted an emergency interim sign ordinance on August 3, 2005 and enacted a new permanent sign ordinance on August 16, 2005. The new sign ordinance cured the constitutional infirmities that formed the basis of Advantage's lawsuit.

On August 8, 2005 Advantage filed a motion for partial summary judgment, and the city filed its summary judgment motion on August 19, 2005. The district court denied Advantage's motion and granted in part and denied in part the city's motion. *Advantage Media, L.L.C. v. City of Hopkins*, 408 F.

Supp. 2d 780 (D. Minn. 2006) (*Advantage II*).[2] As to Advantage's request for fees, the district court held that Advantage was not a prevailing party at that stage because the injunction "was preliminary in nature and was not a decision that granted actual relief on the merits." *Id.* at 796. The district court also denied the city's motion to dismiss Advantage's claims for damages and fees and set the case for trial. *Id.* at 796-97.

In September 2006 a two day jury trial was held on whether the city unconstitutionally refused Advantage's applications based on their content and whether Advantage was entitled to damages. The jury determined that the city had denied Advantage's applications on a content neutral basis and therefore Advantage was not entitled even to nominal damages.

On October 30, 2006 Advantage filed a limited motion for attorney fees and costs related to procuring the preliminary injunction. The city filed its own motion for attorney fees. The district court denied Advantage's motion on the grounds that it was not a prevailing party for the purpose of 42 U.S.C. § 1988. *Advantage Media, L.L.C. v. City of Hopkins,* 2007 WL 270426 (D. Minn. Jan. 29, 2007) (*Advantage III*). The court found that Advantage had not obtained a "judicially sanctioned material alteration to the parties' legal relationship in a manner that benefited Advantage" as required to attain prevailing party status, and Advantage therefore did not satisfy § 1988's requirements to receive attorney fees. *Id.* *2-3, *citing Advantage*

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[2] The district court also dismissed a second plaintiff, Hispanic Chamber of Commerce of Minnesota, for lack of standing. *See Advantage II,* 408 F. Supp. 2d at 785-88.

Media, L.L.C. v. City of Eden Prairie, 456 F.3d 793, 801-02 (8th Cir. 2006) ("[§ 1988 attorney fees] can be awarded only to a 'prevailing party' who receives 'actual relief on the merits of his claim'; Advantage could never be such a party, for even in victory it would be 'no closer' to erecting its billboards or obtaining damages than when litigation began.") (internal citations omitted). The court also denied the city's motion for fees. Advantage now appeals the district court's determination that it was not a prevailing party under 42 U.S.C. § 1988 for the purpose of obtaining attorney fees related to obtaining the preliminary injunction.

II.

We review de novo both "the determination of whether a litigant is a prevailing party," *Salitros v. Chrysler Corp.*, 306 F.3d 562, 576 (8th Cir. 2002), and "the legal issues related to the award of attorney fees," *Thompson v. Wal-Mart Stores, Inc.*, 472 F.3d 515, 516 (8th Cir. 2006).

Advantage argues that the district court erroneously concluded that the preliminary injunction did not bring about a material change in the parties' legal relationship and that it qualifies as a prevailing party under 42 U.S.C. § 1988. It also contends that under Supreme Court precedent its success in obtaining a preliminary injunction qualifies Advantage as a prevailing party eligible for an award of attorney fees. The city argues that Advantage is not a prevailing party because it did not show that the city unconstitutionally rejected its sign applications and because it did not obtain an "enforceable judgment on the merits" or a "court-ordered consent decree." The city also asserts that

the fact that Advantage obtained a preliminary injunction which compelled the city to cure the ordinance's constitutional defects cannot qualify Advantage as a prevailing party because the Supreme Court has rejected the catalyst theory in the fee shifting context.

Parties to a lawsuit generally must bear their own costs, *see Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep't of Health & Human Res.*, 532 U.S. 598, 602, 121 S. Ct. 1835 (2001), but Congress has provided in 42 U.S.C. § 1988(b) that "[i]n any action or proceeding to enforce a provision of [various civil rights statutes including 42 U.S.C. § 1983] the court, in its discretion, may allow the prevailing party ... a reasonable attorney's fee as part of the costs...." Accordingly, a "plaintiff must be a 'prevailing party' to recover an attorney's fee under § 1988." *Hensley v. Eckerhart*, 461 U.S. 424, 433, 103 S. Ct. 1933 (1983).

The test for prevailing party explained by Supreme Court is that "a plaintiff 'prevails' when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." *Farrar v. Hobby*, 506 U.S. 103, 111-12, 113 S. Ct. 566 (1992); *see Texas State Teachers Ass'n v. Garland Indep. School Dist.*, 489 U.S. 782, 792-93, 109 S. Ct. 1486 (1989) ("The touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute."). The Supreme Court refined this standard in *Buckhannon* when it rejected the "catalyst" theory, which had been endorsed by all but one of the circuit courts and

which permitted a plaintiff to recover fees if its lawsuit achieved the desired result through a voluntary change in the defendant's conduct. 532 U.S. at 602, 605, 121 S. Ct. 1835. The Court held instead that a party must obtain a *judicially sanctioned* material alteration of the legal relationship between the parties to the lawsuit to achieve prevailing party status. *Id.* at 604-05. Surveying its past cases the Court determined that enforceable judgments on the merits and consent decrees create the requisite material alteration in the parties' legal relationship to achieve prevailing party status. *See id.* at 603-04, 121 S. Ct. 1835. Although the statute at issue in *Buckhannon* was a provision of the Fair Housing Act, the Court's analysis applies generally to fee shifting statutes incorporating the "prevailing party" language. *See id.* at 603, 121 S. Ct. 1835; *Cody v. Hillard,* 304 F.3d 767, 773 n.3 (8th Cir. 2002) (recognizing that the "prevailing party" analysis in Buckhannon applies generally to fee shifting statutes).

We have recognized that a preliminary injunction can in some instances carry the judicial imprimatur required by *Buckhannon* to convey prevailing party status. *See Northern Cheyenne Tribe v. Jackson,* 433 F.3d 1083, 1086 (8th Cir. 2006) ("[S]ome preliminary injunctions are sufficiently akin to final relief on the merits to confer prevailing party status."); *see, e.g., Dupuy v. Samuels,* 423 F.3d 714, 723 & n. 4 (7th Cir. 2005) (recognizing that preliminary injunctions can meet *Buckhannon*'s judicial imprimatur requirement); *Watson v. County of Riverside,* 300 F.3d 1092, 1095-96 (9th Cir. 2002) (same). In *Northern Cheyenne* the plaintiff tribes sought and obtained a preliminary injunction to halt the

construction of a shooting range in a mountain formation that contained spiritual significance for them. Because the preliminary injunction had merely maintained the status quo, it did not effect a material alteration in the parties' legal relationship and the plaintiffs therefore were not prevailing parties under § 1988. *Id.* at 1087. The issue before us is similarly whether the judicially sanctioned preliminary injunction in this case effected a material alteration in the parties' legal relationship. We review this issue de novo. *Christina A. v. Bloomberg*, 315 F.3d 990, 992 (8th Cir. 2003).

Advantage filed suit to erect its signs in Hopkins, to obtain damages for violation of its constitutional right to free speech, and to enjoin the city from enforcing a purportedly unconstitutional ordinance. Advantage obtained no relief in respect to its first goal. After the Hopkins sign ordinance was enjoined in *Advantage I*, Advantage moved the district court for an order compelling the city to permit it to erect its signs. The district court determined that Advantage was subject to the ordinance's valid time, place, and manner restrictions. *See Advantage II*, 408 F. Supp. 2d at 791-92. Because the largest signs permitted under either version of the ordinance were 250 square feet, the district court refused to compel the city to issue Advantage permits to construct the 672 square feet signs it wanted. *Id.* at 792. The signs Advantage sought to erect have never been built, and it is no closer to erecting its billboards than it was when the litigation began despite the preliminary injunction. *See Granite State Outdoor Adver., Inc. v. City of St. Petersburg*, 348 F.3d 1278, 1283-84 (11th Cir. 2003) (determining that the sign

company was not a prevailing party because it failed to obtain permission to erect its signs).

Advantage claimed that the unconstitutional enforcement of the ordinance caused it monetary damage because it could not advertise on the proposed signs. At the trial on the issue of damages, two questions were put to the jury. The first asked whether the city had denied or refused Advantage's sign application based on the content of the billboards rather than their size, and the second asked whether Advantage should receive nominal damages if the city's denial of the sign permits was not a "direct cause of substantial injuries." The jury found that the city had turned down Advantage's billboard applications because of size provisions rather than because of any content or message to be displayed and that Advantage should therefore receive no damages. The jury's final resolution of the issues reflects that, as to Advantage, the unconstitutional provisions of the Hopkins's sign code had no impact.

Although Advantage's lawsuit resulted in alteration of several potentially unconstitutional provisions of the Hopkins sign ordinance, the Supreme Court has rejected the "catalyst" theory of fee recovery as a means of attaining prevailing party status. *See Buckhannon,* 532 U.S. at 604-05, 121 S. Ct. 1835. We have previously stated that "a judicial pronouncement that the defendant has violated the Constitution, without more, does not make a plaintiff a prevailing party." *Peter v. Jax,* 187 F.3d 829, 837 (8th Cir. 1999) (internal quotations omitted). Advantage has not shown that the ordinance was unconstitutional as applied to it, and the issuance of the preliminary injunction thus had no impact on the

relationship between Advantage and the city. *See Farrar*, 506 U.S. at 113-14, 113 S. Ct. 566 (something more than a technical victory is required to confer prevailing party status). Because the constitutionally suspect provisions of the sign ordinance were never applied to Advantage, the preliminary injunction effected no material alteration in the parties' legal relationship.

Because Advantage failed to obtain permission to erect its signs, to show that its free speech rights had been violated, or to prove that the preliminary injunction effected a material alteration in the parties' legal relationship, we conclude that it received no relief that materially altered the legal relationship between it and the city. Advantage is therefore not a prevailing party under § 1988, and an award of attorney fees pursuant to that section would be inappropriate.

The Supreme Court's recent decision in *Sole v. Wyner* supports this result. --- U.S. ----, 127 S. Ct. 2188 (2007). In *Sole*, Wyner wanted to create a large peace sign featuring nude people in a Florida state park and sued to enjoin enforcement of a state regulation requiring park visitors to be dressed at least in bathing suits. *Id.* at 2192-93. The respondent sought attorney fees for obtaining a preliminary injunction which was later dissolved by the district court. *Id.* at 2193-94. According to the Court, "[p]revailing party status, we hold, does not attend achievement of a preliminary injunction that is reversed, dissolved, or otherwise undone by the final decision in the same case." *Id.* at 2195. A plaintiff who "secures a preliminary injunction, then loses on the merits as the case plays out and judgment is entered against her has won a battle but

lost the war." *Id.* at 2196 (citing *Watson,* 300 F.3d at 1096).

Although the final judgment on the merits in *Sole* resulted from the denial of a permanent injunction and here it resulted from an adverse jury verdict, that distinction is irrelevant. As the Court stated "[o]f controlling importance to our decision, the eventual ruling on the merits for defendants, after both sides considered the case fit for final adjudication, superseded the preliminary ruling." *Id.* at 2195-96. In both this case and *Sole*, the final judgment reversed the effect of the preliminary injunction as to the plaintiff. The district court in *Sole* refused to issue a permanent injunction because it determined that the regulation was not unconstitutional as applied to respondent Wyner, and in this case the jury found that the sign ordinance was not unconstitutionally applied to Advantage. *See id.* at 2193. Because the final judgment resulted in a finding of no constitutional violation as to Advantage, it would be wrong to find Advantage a prevailing party. *See id.* at 2192 ("A plaintiff who achieves a transient victory at the threshold of an action can gain no award under that fee-shifting provision if, at the end of the litigation, her initial success is undone and she leaves the courthouse emptyhanded.").

Because the issuance of the preliminary injunction did not materially alter the legal relationship between the parties, Advantage is not a prevailing party under § 1988(b). We therefore affirm the judgment of the district court.

United States District Court
D. Minnesota

ADVANTAGE MEDIA, L.L.C., Plaintiff,

v.

CITY OF HOPKINS, MINNESOTA, Defendant.

Civil File No. 04-4959 (MJD/JJG).

Jan. 29, 2007.

E. Adam Webb, Webb & Porter, LLC, and Stephen W. Cooper, Cooper Law Office, Counsel for Plaintiffs Advantage Media, L.L.C., and Hispanic Chamber of Commerce of Minnesota.

Paul D. Reuvers and Jason J. Kuboushek, Iverson Reuvers, LLC, Counsel for Defendant City of Hopkins.

MEMORANDUM OF LAW & ORDER

MICHAEL J. DAVIS, United States District Court.

I. INTRODUCTION

This matter is before the Court on Plaintiff Advantage Media, L.L.C.'s Motion for Attorney Fees [Docket No. 89] and Defendant City of Hopkins' Motion for Attorney Fees [Docket No. 95].

II. FACTUAL BACKGROUND

Plaintiff Advantage Media, L.L.C. ("Advantage") is a Minnesota company that develops and operates advertising signs used by businesses, churches, organizations, and individuals to communicate both commercial and noncommercial messages. Former Plaintiff Hispanic Chamber of Commerce of Minnesota ("HCCM") is a 200-member nonprofit community and economic development organization that provides training, technical assistance, workforce development, and other resources to Latino individuals and entrepreneurs. Defendant is the City of Hopkins ("the City"). The City is a suburban community of over 17,000 residents located thirteen miles from Minneapolis.

Advantage applied for permits to build four 672 square-foot tri-vision billboards in the City. The City did not process, and subsequently denied, Advantage's permit applications. Advantage filed suit against the City on December 8, 2004, alleging that the City's sign ordinance in effect at that time ("Former Ordinance") violated the First Amendment, both facially and as-applied to Advantage. On July 5, 2005, Plaintiffs filed a Motion for a Preliminary Injunction seeking to enjoin enforcement of the Former Ordinance. This Court granted Advantage's Motion on July 29, 2005, and enjoined the City from enforcing the Former Ordinance. *Advantage Media, L.L.C. v. City of Hopkins*, 379 F. Supp. 2d 1030, 1033 (D. Minn. 2005). The Court held that Advantage demonstrated a likelihood of success on the merits of its claims that the Former Ordinance was content-based, failed strict scrutiny analysis, favored commercial over non-commercial speech, and

violated equal protection.

On August 16, 2005, the Hopkins City Council repealed the Former Ordinance. The City Council then enacted Ordinance No. 2005-955, a new sign ordinance ("2005 Ordinance"). The 2005 Ordinance was made effective immediately upon enactment on August 16, 2005. The 2005 Ordinance specified that the contents of a proposed sign would not be taken into account in determining whether to grant or deny a sign permit. The largest sign permitted anywhere within the City, under either the Former Ordinance or the 2005 Ordinance was 250 square feet.

Subsequently, Plaintiffs filed a Motion for Partial Summary Judgment asking the Court to enter an order allowing them to erect the four signs in question. Plaintiffs also sought an opportunity to prove their damages before a jury. The City filed a Motion for Summary Judgment arguing that the signs should not be developed because the proposed signs violated other provisions of the City's zoning laws, namely, the setback requirements and size restrictions within the 2005 Ordinance.

On January 5, 2006, the Court issued its Order 1) dismissing HCCM for lack of standing; 2) denying Advantage's Motion for Partial Summary Judgment; and 3) granting in part and denying in part the City's Motion for Summary Judgment by denying summary judgment on the issue of the existence of legal damages to Advantage and dismissing Advantage's equitable request for an order to allow construction of the signs. *Advantage Media, L.L.C. v. City of Hopkins,* 408 F. Supp. 2d 780, 797 (D. Minn. 2006).

In its Order, the Court held that Advantage was not a prevailing party at that stage in the litigation.

It held, "Advantage is not a prevailing party because the [Preliminary Injunction] was preliminary in nature and was not a decision that granted actual relief on the merits." *Id.* at 796.

A jury trial on the issues of whether the City refused Advantage's billboard applications based on their content and whether Advantage was entitled to nominal damages began on September 25, 2006. On September 26, 2006, the jury returned a verdict against Advantage on both questions. On September 28, 2006, the Court entered judgment in favor of the City. Advantage did not appeal the judgment.

Advantage requests the portion of its fees and costs incurred from December 6, 2004, two days before the Complaint was filed, through August 4, 2005, the day after the City passed the interim ordinance. The City requests attorney fees and costs incurred in this litigation to be paid by HCCM and Advantage.

III. DISCUSSION

A. Advantage's Motion for Attorney Fees

1. Standard for Determination of Prevailing Plaintiff

In any action brought to enforce 42 U.S.C. § 1983, "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988(b). "[A] plaintiff 'prevails' when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." *Farrar v. Hobby*, 506 U.S. 103, 111-12

(1992). To be a prevailing party, a plaintiff "must 'succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit.' " *Forest Park II v. Hadley*, 408 F.3d 1052, 1059 (8th Cir. 2005) (quoting *Farrar*, 506 U.S. at 109). If a plaintiff does not achieve any success on its § 1983 claim, its claim for attorney fees as a prevailing party must fail. *Id.* (citing *Nat'l Private Truck Council, Inc. v. Okla. Tax Comm'n*, 515 U.S. 582, 592 (1995).

Although, in past cases, courts have awarded attorney fees when a plaintiff's lawsuit was a catalyst for the defendant's voluntary compliance, in 2001,

> the Supreme Court rejected the "catalyst theory" then prevailing in the circuit courts, which permitted a plaintiff to recover fees if the lawsuit achieved the desired result through a voluntary change in the defendant's conduct. Instead, the Court held that, to be a prevailing party entitled to a statutory attorneys' fee award, a party must obtain a judicially sanctioned material alteration of the legal relationship of the parties to the lawsuit.

N. Cheyenne Tribe v. Jackson, 433 F.3d 1083, 1085 (8th Cir. 2006) (citing *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dept. of Health & Human Resources*, 532 U.S. 598, 604-05 (2001)).

In the case where a plaintiff successfully obtains a preliminary injunction, but the case then becomes moot, "a preliminary injunction granting temporary relief that merely maintains the status quo does not confer prevailing party status." *N. Cheyenne Tribe*, 433 F.3d at 1086 (citations omitted). However,

"some preliminary injunctions are sufficiently akin to final relief on the merits to confer prevailing party status.... For example, the grant of a preliminary injunction should confer prevailing party status if it alters the course of a pending administrative proceeding and the party's claim for a permanent injunction is rendered moot by the impact of the preliminary injunction." *Id.* (citations omitted).

2. Whether Advantage Is a Prevailing Party

Advantage asserts that it is a prevailing party because the Court's issuance of the Preliminary Injunction barred the City from enforcing its unconstitutional sign ordinance against Advantage and the citizens and organizations of the City and caused the City to adopt a new ordinance in order to comply with the Constitution.

Advantage argues that its litigation caused the City to repeal the Former Ordinance and pass the new 2005 Ordinance. It notes that the 2005 Ordinance even contained reference to this lawsuit and the Preliminary Injunction. However, as the Court already noted, the Supreme Court rejected the catalyst theory of recovery in *Buckhannon*. The City's voluntary enactment of the 2005 Ordinance, based on the Court's preliminary holding that Advantage demonstrated a likelihood of success on the merits of its claim, did not constitute a judicially sanctioned material alteration of the legal relationship between Advantage and the City.

Even after the Preliminary Injunction, Advantage's claims were not all mooted. It proceeded to trial on the issue of whether the unconstitutional content-based requirements of the Former Ordinance damaged Advantage and lost.

Advantage did not obtain the relief it sought-it is still unable to erect its signs and was not entitled to compensatory or nominal damages.

Nothing in the Preliminary Injunction said "that Advantage Media could build 672 square foot billboards." *Advantage Media, L.L.C.*, 408 F. Supp. 2d at 793. Instead, the Preliminary Injunction determined that Advantage was likely to succeed on the merits of its constitutional claims, which it ultimately did not. Advantage obtained no judgment in its favor-not even nominal damages. It did not obtain a declaratory judgment that the Former Ordinance was unconstitutional. In any case, "a judicial pronouncement that the defendant has violated the Constitution, unaccompanied by an enforceable judgment on the merits, does not render the plaintiff a prevailing party. Of itself, the moral satisfaction [that] results from any favorable statement of law cannot bestow prevailing party status." *Farrar v. Hobby*, 506 U.S. 103, 112 (1992) (citation omitted). When the plaintiff "can point to no effect that the judicial declaration had on the City's behavior toward [the plaintiff] ... [the plaintiff] did not receive an 'enforceable judgment' and was not a prevailing party." *Sierra Club v. City of Little Rock*, 351 F.3d 840, 845 (8th Cir. 2003). Cf. *Advantage Media, L.L.C. v. City of Eden Prairie*, 456 F.3d 793, 801-02 (8th Cir. 2006) ("[§ 1988 attorney fees] can be awarded only to a prevailing party who receives actual relief on the merits of his claim; Advantage could never be such a party, for even in victory it would be no closer to erecting its billboards or obtaining damages than when litigation began.") (citations omitted).

The Court concludes that Advantage is not a

prevailing party entitled to an award of attorney fees and costs. Although Advantage's lawsuit did indeed influence the City to repeal an ordinance that was likely unconstitutional and enact a new constitutional sign ordinance, Advantage did not obtain a judicially sanctioned material alteration to the parties' legal relationship in a manner that benefitted Advantage. As the jury determined, the unconstitutionality of the previous ordinance did not cause any injury to Advantage, and Advantage did not obtain the right to erect its signs. While in a broad sense Advantage's lawsuit served a public good by influencing the City to change its sign ordinance to conform to the Constitution, Advantage did not prevail under the standards of § 1988. Because Advantage is not a prevailing party, it is not entitled to attorney fees and costs. The Court now turns to the City's request for attorney fees.

B. The City's Motion for Attorney Fees

1. Standard for Award of Fees to Prevailing Defendant

Pursuant to 42 U.S.C. § 1988(b), a prevailing defendant may recover fees if the plaintiff's suit was "frivolous, unreasonable, or groundless." *Dillon v. Brown County, Neb.*, 380 F.3d 360, 365 (8th Cir. 2004) (citation omitted). When conducting this inquiry, "courts should 'resist the understandable temptation to engage in *post hoc* reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation.'" *Id.* (quoting *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421-22 (1978)).

2. Whether the City Is Entitled to Attorney Fees

a. Advantage

The City requests that the Court order Advantage to pay all of its attorney fees. The City argues that Advantage knew at the time it submitted its billboard applications that the largest sign permitted anywhere in Hopkins was 250 square feet. It asserts that Advantage knew its applications were improper, particularly in light its experience with sign ordinance litigation. It notes that this Court has previously viewed Advantage's tactics "with dim suspicion" because it "attempted to engineer an artificial vested right" to construct its billboards. *Advantage Media, L.L.C. v. City of Hopkins,* 408 F. Supp. 2d 780, 796 (D. Minn. 2006).

Advantage began this lawsuit with a plausible claim. It succeeded in its motion for a preliminary injunction, thereby influencing the City to repeal the Former Ordinance and enact a new sign ordinance. After the Court found it likely that the City's Former Ordinance was unconstitutional, the Court cannot say that it was unreasonable or groundless for Advantage to seek damages based on the City's enforcement of the Former Ordinance against Advantage. A trial on the merits was required to resolve Advantage's claim that the City rejected its application based on content.

The Court holds that this lawsuit cannot be labeled as frivolous, unreasonable, or groundless simply because Advantage failed to succeed on its claims. Although the Court viewed some of Advantage's litigation techniques with suspicion, overall, the lawsuit was not frivolous. In a general

sense, Advantage's lawsuit served a public interest by being a catalyst for the City to rid itself of an unconstitutional content-based ordinance. The City is not entitled to attorney fees.

b. HCCM

The City requests that HCCM be held jointly liable for the City's attorney fees and costs incurred through the date of the summary judgment order dismissing HCCM. The City asserts that HCCM asserted claims against the City although it had no legitimate interest in the outcome of the litigation and had been recruited by Advantage as a "straw man."

When this Court dismissed HCCM as a party, it did not conclude that HCCM's claims were frivolous, groundless, or unreasonable. Although, through discovery, it became apparent that HCCM was not a proper party to this lawsuit, its claims were not lacking an arguable basis in fact or law such that the City is entitled to attorney fees.

IT IS HEREBY ORDERED that:

1. Plaintiff Advantage Media, L.L.C.'s Motion for Attorney Fees [Docket No. 89] is **DENIED.**

2. Defendant City of Hopkins' Motion for Attorney Fees [Docket No. 95] is **DENIED.**

United States District Court
D. Minnesota

ADVANTAGE MEDIA, L.L.C., and Hispanic Chamber of Commerce of Minnesota, Plaintiffs,

v.

CITY OF HOPKINS, Defendant.

No. CIV.04-04959 (MJD/JGL).

July 29, 2005

MEMORANDUM AND ORDER

DAVIS, District Judge.

I. INTRODUCTION

Plaintiffs Advantage Media, L.L.C., ("Advantage") and Hispanic Chamber of Commerce of Minnesota claim that a sign ordinance in the City of Hopkins ("the City") violates the First Amendment, both facially and as applied to them. The instant matter before the Court is Plaintiffs' Motion for Preliminary Injunction [Document No. 10] to enjoin enforcement of the ordinance, which was heard on July 27, 2005. As more fully detailed below, Plaintiffs have demonstrated a likelihood of success on the merits, and Plaintiffs' Motion for Preliminary Injunction shall be granted.

II. FACTUAL BACKGROUND

The facts of this case are largely undisputed. Plaintiff Advantage is a Minnesota company that develops and operates advertising signs used by businesses, churches, organizations, and individuals to communicate both commercial and noncommercial messages. Advantage claims that the City has a shortage of advertising signs, so its representatives have expended substantial time and effort investigating potential sign locations. All of the proposed locations at issue are in commercial areas adjacent to major roadways.

The City's Sign Ordinance, HOPKINS ZONING CODE § 570 (the "Ordinance"), regulates all signs within the City, stating, among other things:

> *Permit Required.* No or [sic] sign shall be erected, altered, reconstructed, maintained or moved in the city without first securing a permit therefore from the city. Application for a permit shall be in writing addressed to the zoning administrator and shall contain at least the following information:
> a) the exact location of proposed sign including the name, address and legal description of premises;
> b) the name and address of owner of sign;
> c) the size and dimensions of sign;
> d) the cost of sign; and
> e) the purpose and intended duration.

HOPKINS ZONING CODE § 570.03 (emphasis in original).

The Ordinance states that its purpose is to "protect the public health safety, morals, comfort, convenience and general welfare" and to "limit congestion in the public right-of-way." HOPKINS CODE § 515.03 (Intent and Purpose). Section 570.54 of the Ordinance, which concerns the business park district, was enacted "to establish and maintain high quality site planning, architecture, signage and landscape design to create an attractive and unified development character." HOPKINS ORDINANCE NO. 97-795; HOPKINS ZONING CODE § 541.01; *see id.* at § 570.54.

On or about November 23, 2004, Advantage submitted four sign application packages to the authorized City official. That City official refused to accept the applications for processing, despite Advantage's repeated requests. Because of the City's refusal to process the applications, Advantage requested a written statement regarding the processing of the applications. Again, the City official refused to accept the applications and denied Advantage's request for a written response. Despite the City's denial, Advantage left the completed application packages with the City official for processing.

On December 4, 2004, the City mailed Advantage the application packages, unprocessed. The City included a note simply stating that the application packages were being returned. On January 21, 2005, the City Planner sent Advantage a letter stating that "[t]hese applications were denied because they failed to meet the size and location requirements set forth in the City's sign ordinance." The proposed signs were 600 to 800 square feet, while the largest sign

permitted in the business district is 60 to 80 square feet. Advantage has not posted the requested signs.

Plaintiff Hispanic Chamber of Commerce of Minnesota ("HCCM") is a 200-member nonprofit community and economic development organization that provides training, technical assistance, workforce development, and other resources to Latino individuals and entrepreneurs. HCCM's members are primarily small businesses that benefit from signs such as those provided by Advantage, because such signs are often the most targeted and cost efficient means for HCCM's members to convey commercial and noncommercial messages. The topics of those messages include products, services, ideas, candidates, issues, and events, as well as political, ideological, and religious messages. HCCM claims that alternative avenues of communication, such as newspapers and television, are often cost-prohibitive or do not reach its targeted audience. HCCM seeks to post signs on their and others' property, but because of the City's enforcement of the Ordinance, HCCM claims that its members have refrained from erecting such signs in fear of civil and criminal penalties, including fines, forfeiture of property, and possible imprisonment.

Plaintiffs seek a preliminary injunction to enjoin the City from enforcing the Ordinance in its entirety.

III. DISCUSSION

A. Preliminary Injunction Standard

To prevail on a motion for preliminary injunction, a court must consider (1) the moving party's probability of success on the merits; (2) the threat of irreparable harm to the moving party; (3) the

balance between this harm and the injury that granting the injunction will inflict on other interested parties; and (4) the public interest in the issuance of the injunction. *Vonage Holdings Corp. v. Minn. Pub. Utils. Comm'n,* 290 F. Supp. 2d 993, 996 (D. Minn. 2003) (citing *Dataphase Sys., Inc. v. C L Sys., Inc.,* 640 F.2d 109, 114 (8th Cir. 1981) (en banc)). No single factor is determinative; rather, the probability of success must be examined in the context of the relative injuries to the parties and to the public. *Dataphase,* 640 F.2d at 113; *see West Publ'g Co. v. Mead Data Cent., Inc.,* 799 F.2d 1219, 1222 (8th Cir. 1986). Although no one factor is determinative, likelihood of success on the merits is generally the touchstone inquiry. *Dataphase,* 640 F.2d at 113. The party requesting injunctive relief bears the "complete burden" of proving all of the factors. *Gelco Corp. v. Coniston Partners,* 811 F.2d 414, 418 (8th Cir. 1987).

Plaintiffs have clearly satisfied the second, third, and fourth elements of the preliminary injunction analysis. For each day that passes while Plaintiffs-or any citizen-are deprived of the constitutional right to post and read signs, such a delay establishes the threat of irreparable injury. *Elrod v. Burns,* 427 U.S. 347, 373, 96 S. Ct. 2673, 49 L.Ed.2d 547 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.") (plurality opinion); *see Riley v. Nat'l Fed'n of the Blind,* 487 U.S. 781, 802, 108 S. Ct. 2667, 101 L.Ed.2d 669 (1988) (holding statute unconstitutional, where "delay compels the speaker's silence"); *Mga Susu, Inc. v. County of Benton,* 853 F. Supp. 1147, 1154 (D. Minn. 1994) (holding threat of criminal prosecution for the exercise of First

Amendment freedoms established threat of irreparable harm).

With regard to the third factor, the balance of harms favors granting an injunction where the threat to a plaintiff's First Amendment rights outweighs a city's impaired ability to exercise its police powers. *See Bukaka, Inc. v. County of Benton,* 852 F. Supp. 807, 811 (D. Minn. 1993) (holding that city's impaired police powers were outweighed by plaintiff's "serious and imminent" First Amendment rights). On the record before this Court, the balance of harms favors Plaintiffs' expression of their First Amendment rights.

The final factor, the public interest, is also present here, because "the public interest favors preventing enforcement of an ordinance that unconstitutionally restrains protected expression." *Mga Susu,* 853 F. Supp. at 1154.

Accordingly, to obtain a preliminary injunction, the success of Plaintiffs' motion hinges upon whether Plaintiffs bear their burden of demonstrating a substantial probability of success on the merits. The following sections analyze this factor.

B. Standing

As an initial matter, Defendant challenges Plaintiffs' standing to raise as-applied and facial challenges to the Ordinance. Plaintiff Advantage submitted a sign application, and the City denied that application-initially without a written reason, and later by providing a letter drafted almost 60 days later-stating that the "applications were denied because they failed to meet the size and location requirements set forth in the City's sign ordinance." HCCM claims that its speech has been chilled

because although its members would like to display messages in the City, the Ordinance prohibits them from doing so without being subject to the "unbridled discretionary authority of City officials."

1. Traditional Standing

To establish standing, a plaintiff must demonstrate (1) that it has suffered an "injury in fact" which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) a causal connection between the injury and the complained-of conduct and that the injury is "fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court;" (3) and that it is "likely" rather than merely "speculative" that the injury will be "redressed by a favorable decision." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L.Ed.2d 351 (1992).

Advantage clearly has traditional standing because it submitted an application that the City initially refused to process, and later denied. This application and denial unmistakably demonstrates that Advantage has as-applied standing to challenge the Ordinance.

Further, because both Plaintiffs have submitted evidence that they have refrained from posting signs out of fear that the City will enforce its Ordinance against them, this self-censorship similarly gives them standing. *See Krantz v. City of Fort Smith,* 160 F.3d 1214, 1217 (8th Cir. 1998) (holding that plaintiffs have standing where they "have alleged and have sufficiently demonstrated an actual and well-founded fear that the law in question will be enforced against them") (citing *Steffel v. Thompson,*

415 U.S. 452, 462, 94 S. Ct. 1209, 39 L.Ed.2d 505 (1974)).

Defendant also challenges both HCCM's direct and associational standing to challenge the City's regulations, claiming that HCCM has no interest in the suit that is distinct from a member of the public. To support this assertion, Defendant points to another case before in this district in which Advantage Media sought to add HCCM as a party in a Motion to Amend Complaint to Join Plaintiff, which was referred to the Magistrate Judge. *Advantage Media v. City of Eden Prairie,* Case No. 04-3582 (DSD/SRN) (D. Minn.). In the *Eden Prairie* case, Advantage filed its motion on March 11, 2005- two months before the May 15 discovery deadline. On June 16, after considering deposition testimony from HCCM's Executive Director Val Vargas, the Magistrate Judge denied Advantage's motion to add HCCM as a plaintiff, concluding that HCCM lacked both direct standing and associational standing. *Eden Prairie,* supra, at Docket No. 40. (June 16, 2005).

In an attempt to bolster its standing argument, Defendant points to the deposition testimony from the *Eden Prairie* case to support its claim that HCCM lacks standing in this case. Specifically, Defendant cites the depositions of Advantage principals Edward Daum and Dennis DuPont, as well as HCCM Executive Director Val Vargas. The Court does not see the relevance of that evidence in this case.

Plaintiffs persuasively argue that the *Eden Prairie* testimony refers to a wholly different city and a wholly distinct ordinance, so the deposition testimony is inadmissible hearsay. Hearsay is

defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." FED. R. EVID. 801(c). Such evidence is inadmissible unless it clearly falls within the purview of a recognized exception. FED. R. EVID. 802.

The City's proffered evidence of deposition testimony falls within the definition of hearsay. The questions and answers elicited may be enlightening as to that city and the facts of that case, but they do not provide insight into Plaintiffs' activities, perceptions, and intent with regard to the municipality at issue: the City of Hopkins. Here, the City would like to use that testimony to prove the truth of matters asserted regarding Hopkins, but that testimony is silent with regard to the City of Hopkins and its distinct Ordinance. Because the *Eden Prairie* deposition testimony stems from an unrelated case, because it is being offered as evidence to prove the truth of the matter asserted, and because it does not fall within a recognized exception to hearsay, that deposition testimony is inadmissible here. For similar reasons, the magistrate judge's conclusion that HCCM lacks standing in the *Eden Prairie* matter is not persuasive with regard to this case, which involves a different city and different statute.

Rather, the only non-hearsay evidence in this record regarding HCCM's standing is the declaration of Val Vargas, which states that her organization's members have refrained from erecting signs on their or others' properties because they cannot risk civil and criminal penalties, including fines, forfeiture of property, and possible imprisonment. Because this

record lacks admissible evidence to the contrary, this evidence is sufficient to demonstrate traditional standing.

2. Facial Challenge

Defendant next argues that Plaintiffs lack sufficient standing to challenge the Ordinance on its face. The two means by which a plaintiff may challenge a statute or ordinance on its face are either (1) because it is unconstitutional in every conceivable application or (2) because it seeks to prohibit such a broad range of protected conduct that it is unconstitutionally overbroad. *Members of City Council of City of Los Angeles v. Taxpayers for Vincent,* 466 U.S. 789, 797, 104 S. Ct. 2118, 80 L.Ed.2d 772 (1984). The second means, the overbreadth doctrine, provides an exception to the general principle that a party may only assert their own rights and not the claims of third parties not before the court. *See Village of Schaumburg v. Citizens for a Better Env't,* 444 U.S. 620, 634, 100 S. Ct. 826, 63 L.Ed.2d 73 (1980).

Plaintiffs have standing to facially challenge the Ordinance because they have been injured by at least one provision of that Ordinance. *Tanner Adver. Group, L.L.C. v. Fayette County,* 411 F.3d 1272, 1277 (11th Cir. 2005) (holding that because sign company was injured by at least one provision of sign ordinance, it has standing to challenge entire ordinance under the overbreadth doctrine) (citing *Solantic, LLC v. City of Neptune Beach,* 410 F.3d 1250 (11th Cir. 2005) (holding plaintiff had standing to facially challenge all unconstitutional elements of ordinance, regardless of whether those provisions were enforced against it)). Further, HCCM's well-

founded fear of prosecution because of the Ordinance similarly provides it with standing to mount a facial challenge to the Ordinance. *See City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 755-56, 108 S. Ct. 2138, 100 L.Ed.2d 771 (1988) (holding that "one who is subject to the law may challenge it facially without the necessity of first applying for and being denied, a license"); *Ways v. City of Lincoln, Neb.*, 274 F.3d 514, 518 (8th Cir. 2001) ("An ordinance prohibiting a broad range of protected expression may be facially challenged as overbroad.").

3. Conclusion: Standing

Here, the denial of Advantage's application, as well as HCCM's declaration that its members have a well-founded fear that the Ordinance will be enforced against them if they posted advertising, sufficiently demonstrate the requisite specific present objective harm or a threat of specific future harm. Because the record in the instant case demonstrates that Advantage has applied for-and was denied-a permit for several signs, and because the evidence demonstrates that the Ordinance has precluded HCCM and its members from placing signs in the City, both Plaintiffs have demonstrated sufficient standing to challenge the constitutionality of the Ordinance.

C. Content-Based Regulation

Plaintiffs next make the substantive argument that the Ordinance is impermissibly content-based, in that it regulates all types of signs – categorizing and regulating them based upon content. *See* HOPKINS ZONING CODE § 570.24; 570.27; 570.29;

570.37; 570.39; 570.43; 570.51; 570.53; 570.54; 570.59.

1. Considerations in Content-Based Inquiry.

Because signs are a protected form of expression, regulation of such expression must meet the appropriate level of scrutiny to satisfy constitutional limitations. *City of Ladue v. Gilleo,* 512 U.S. 43, 114 S.Ct. 2038, 129 L.Ed.2d 36 (1994). The first inquiry in determining the level of scrutiny in a First Amendment analysis is whether the regulation is content-based or content-neutral. *See id.; Whitton v. City of Gladstone, Missouri,* 54 F.3d 1400, 1403 (8th Cir. 1995).

Content-neutral regulations must be both subject-matter and viewpoint neutral, and those regulations are "justified without reference to the content of the regulated speech." *Consolidated Edison v. Pub. Serv. Comm'n,* 447 U.S. 530, 537, 100 S. Ct. 2326, 65 L.Ed.2d 319 (1980); *see City of Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 48, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986); *Whitton,* 54 F.3d at 1403. Such content-neutral regulations "are acceptable so long as they are designed to serve a substantial government interest and do not unreasonably limit alternative avenues of communication." *City of Renton,* 475 U.S. at 46-47, 106 S.Ct. 925.

Content-based regulations, in contrast, occur when the content of the speech determines whether the speech is subject to restriction; such regulations are subject to strict scrutiny. *United States v. Playboy Entm't Group, Inc.,* 529 U.S. 803, 813, 120 S.Ct. 1878, 146 L.Ed.2d 865 (2000); *Whitton,* 54 F.3d at 1403-04. Where an ordinance "prohibits otherwise permitted speech solely on the basis of the subjects

the speech addresses," that ordinance is content-based and therefore unconstitutional. *R.A.V. v. City of St. Paul,* 505 U.S. 377, 381, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992).

The Supreme Court has stated that "[t]he principal inquiry in determining content neutrality ... is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Ward v. Rock Against Racism,* 491 U.S. 781, 791, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989) (citation omitted). The preferential treatment of commercial speech over political speech renders an ordinance subject-matter based, and necessarily content-based. *See City of Ladue,* 512 U.S. at 47-48, 114 S.Ct. 2038. Such a regulation "is constitutionally suspect because it grants certain forms of commercial speech a greater degree of protection than noncommercial political speech, a practice which a plurality of the Supreme Court held to be content-based." *Whitton,* 54 F.3d 1400, 1404-05.

2. Whether Hopkins Sign Ordinance is Content-Based

An analysis of whether the Hopkins Ordinance is content-based first requires an examination of that regulation's text.

As noted above, the Ordinance requires a permit for *all* signs in the City of Hopkins. HOPKINS ZONING CODE § 570.03 ("No or [sic] sign shall be erected, altered, reconstructed, maintained or moved in the city without first securing a permit therefor from the city."). The Ordinance broadly defines a "sign" as

> an outdoor structure either stationary or movable, containing any writing, announcements, declaration, demonstration, display, illustration, insignia or illumination used to advertise or promote the distribution of any merchandise or the sale of other property or service of any person.

Id. at § 570.01, subd. 4. A "sign" is also defined as any billboard, showbill, showboard, or sign containing advertising or directional matter: the term does not include traffic directional signs erected and maintained pursuant to law. *Id.* at § 570.01, subd. 2.

These definitions make no reference to size, height, or other physical characteristics. Even a small sign of two square feet is an "advertising sign" or "billboard" if it "directs attention to a business, commodity, service or entertainment not exclusively related to the premise where such sign is located, or to which it is affixed." *Id.* at § 570.01, subd. 5. The Ordinance prohibits the presence of such signs "within 500 feet of public parks, rest areas, or residential structures," and it requires removal of an existing sign if a residence is subsequently built within 500 feet of it. *Id.* at § 570.59. Thus, Plaintiffs accurately note that a residence is prohibited from erecting, without a permit, a small sign stating even such innocuous messages as "Go Vikings" or "Wal-Mart Destroys Small Businesses" because they would not be "exclusively related to the premise where such sign is located, or to which it is affixed." *Id.* at § 570.01, subd. 5.

The Ordinance contains a number of other clearly content-based subdivisions and definitions. *Id.* at §§

570.01 subd. 8 (business signs), subd. 9 (directional signs), subd. 12 (governmental signs), subd. 13 (monuments), subd. 14 (name plates), subd. 18 (time/temperature signs); 570.24 (civic signs); 570.27 (political signs); 570.29 (construction signs); 570.37 (real estate signs); 570.39 (promotional signs for housing); 570.43 (signs showing identity of institutions or housing complex). Plaintiffs contend that through these definitions, the Ordinance improperly bases its regulation upon the content of the message.

In several areas, the Ordinance's regulation of size and duration is unquestionably based upon a sign's type and content. For example, political signs are restricted in size and duration, but other types of messages are given more latitude in both areas. *Compare id.* at §§ 570.27 (limiting residential political sign size to four square feet and to a duration of 30 days before and 7 days after an election); 570.51(7) (four square feet); 570.53(9) (same), *with id.* at §§ 570.29 (construction signs may have 50 square feet and variable time limit); 570.31 (temporary signs with commercial content for new businesses may have 250 square feet and 60 days); 570.37 (limiting real estate signs to 25 square feet and variable time limit); 570.39 (on-site promotional housing signs may be posted for two years and may have 100 square feet, off-site have 32 square feet); 570.55 (permitting on-premises signs up to 60 days after use).

If an official must consider the content of a sign to determine whether an ordinance applies, then that ordinance is content-based. *Forsyth County v. Nationalist Movement,* 505 U.S. 123, 134, 112 S.Ct. 2395, 120 L.Ed.2d 101 (1992) (striking ordinance in

which an official "must necessarily examine the content of the message that is conveyed"); *Clear Channel Outdoor, Inc. v. City of St. Paul,* No. 02-1060 (DWF/AJB), 2003 WL 21857830 (D.Minn. Aug. 4, 2003) (unreported), *available at* 2003 WL 21857830 at *4 (holding unconstitutional a statute where an official "would need to read the sign in order to determine whether it advertised off-premises or on-premises services or commodities, and thus to determine whether the ordinance applies, the ordinance imposes a content-based restriction"); *see Cafe Erotica,* 360 F.3d at 1284-85 (holding that an ordinance "should set forth specific content-neutral grounds under which a sign permit may be denied") (citing *Thomas v. Chicago Park Dist.,* 534 U.S. 316, 322, 122 S.Ct. 775, 151 L.Ed.2d 783 (2002) (upholding an ordinance listing thirteen specific grounds under which a permit application may be denied, none of which "has anything to do with what a speaker might say")).

Defendant relies upon Eleventh Circuit precedent in its argument that the Ordinance is content-neutral because it does not distinguish between *viewpoints,* but instead regulates *all types* of signs in the same manner without suppressing particular ideas or views. *See Messer v. City of Douglasville,* 975 F.2d 1505, 1509 (11th Cir.1992); *see also Granite State Outdoor Advertising v. City of St. Petersburg,* 348 F.3d 1278, 1282 (11th Cir.2003) (holding that ordinance was content-neutral because it was enacted to promote uniformity, preserve aesthetics, and foster safety, and because officials did not consider content of signs before rendering decisions). Defendant also looks to the Sixth Circuit in arguing that the Ordinance's size and height limitations are

viewpoint- and content-neutral because they only regulate a sign's non-expressive elements. *Prime Media Inc. v. City of Brentwood,* 398 F.3d 814, 819 (6th Cir.2005). Defendant lastly contends that Plaintiffs have an alternative communication avenue because they may feel free to submit billboards that satisfy the height and size restrictions. *See id.* (holding that alternative communication opportunities exists because ordinance permits billboards within the size regulations and do "not affect any individual's freedom to exercise the right to speak and to distribute literature in the same place where the posting of signs on public property is prohibited").

But in contrast to its sister circuits, the Eighth Circuit makes no such distinction regarding viewpoints but has instead held that an ordinance is content-based where "it makes impermissible distinctions based *solely* on the content or message conveyed by the sign." *Whitton v. City of Gladstone, Mo.,* 54 F.3d 1400, 1404 (8th Cir.1995) (emphasis in original). The *Whitton* court noted that, like here, the types of words on regulated signs dictated their durational limitations. *Whitton,* 54 F.3d at 1404. Further, the Eighth Circuit expressly rejected an argument-similar to Defendant's here-that a regulation is constitutionally sound where its stated purpose is "justified without reference to the content of the regulated speech." *Id.* at 1406. As such, a regulation may not make a content-based distinction "for reasons unrelated to the legitimate interest that prompted the regulation." *Id.* at 1407. And under *Whitton,* the fact that Plaintiffs may have an alternative venue does not justify an Ordinance's content-based regulation of signs. *See generally*

id.(declining to join dissent's position that alternative channels of speech existed). Here, because the Ordinance's classifications and regulations depend necessarily upon a sign's content, these distinctions clearly render the Ordinance content-based.

Lastly, Defendant argues that Plaintiffs' criticism regarding time limits for political signs is unfounded because the Ordinance section pertaining to the duration of political signs, HOPKINS ZONING CODE § 570.27, has been preempted by a state statute designating durational and numeric limits for noncommercial signs during an election year. *See* MINN. STAT. § 211B.045 (stating that "all noncommercial signs of any size may be posted in any number from August 1 in a state general election year until ten days following the state general election").

But Section 211B.045 regulates only the number and duration of noncommercial signs during a "state general election year." *Id.* The state statute makes not mention of, and therefore does not preempt, the Ordinance's regulation of the size and location of political signs. *Compare* MINN. STAT. § 211B.045 (regulating number and duration) *with* HOPKINS ZONING CODE § 570.27 (regulating duration, size, and zoning district); *see generally Brayton v. City of New Brighton,* 519 N.W.2d 243 (Minn.App.1994) (analyzing first-amendment issue regarding city ordinance without any reference to MINN. STAT. § 211B.045). Thus, the Ordinance continues to function with regard to regulation of political sign sizes and locations at all times. *See Goward v. City of Minneapolis,* 456 N.W.2d 460, 465 (Minn.App.1990) (holding that an "exception for campaign-related

signs renders the ordinance content-based"). Further, because Section 211B.045 specifically limits its application only to the "state general election year," and not to any other time, the Ordinance continues to regulate all political signs at all other times. Lastly, even if the portion of the Ordinance regulating political signs were fully preempted by state statute-and this Court explicitly holds that it is not-the Ordinance's other content-based distinctions (e.g., real estate, promotional housing, etc.) would remain effective without being preempted by Section 211B.045.

Because the Ordinance's regulation of the size and duration of signs is necessarily dependent upon the content of the messages themselves, and because the Ordinance's content-based provisions are not preempted by state statute, Plaintiffs have demonstrated a substantial likelihood of success in showing that the Ordinance is content-based.

(a) *Commercial vs. Non-Commercial Speech*

Plaintiffs further contend that the regulation is impermissibly content-based because the Ordinance favors commercial speech over noncommercial speech. The Supreme Court has held that localities may not favor commercial over noncommercial speech in addressing similar urban issues. *Metromedia,* 453 U.S. at 513, 101 S.Ct. 2882; *see City of Ladue v. Gilleo,* 512 U.S. 43, 50-51, 52, 114 S.Ct. 2038, 129 L.Ed.2d 36 (1994) (invalidating sign regulation that banned most signs but made exceptions for commercial speech; holding that statutes may not discriminate based upon signs' messages and may not prohibit too much protected speech). The Supreme Court has also held that,

regardless of a city's intent, the distinguishing between types of content renders an ordinance content-based. *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429, 113 S.Ct. 1505, 123 L.Ed.2d 99 (1993) (holding that ordinance banning use of newsracks to distribute commercial handbills but not newspapers was content-based because "whether any particular newsrack falls within the ban is determined by the content of the publication resting inside that newsrack"). In the same way, Plaintiffs have demonstrated a substantial likelihood of success that the City's distinguishing between commercial speech (e.g., real estate) and noncommercial speech (e.g., political signs) renders the Ordinance content-based.

D. Strict Scrutiny of Content-Based Regulations

Because Plaintiffs have demonstrated a likelihood of success in demonstrating that the Ordinance is content-based, then that regulation "can stand only if it satisfies strict scrutiny." *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813, 120 S.Ct. 1878, 146 L.Ed.2d 865 (2000) (citation omitted). To satisfy strict scrutiny, a regulation "must be narrowly tailored to promote a compelling Government interest." *Id.* Generally, a content-based regulation is unconstitutional unless the government proves that it is "necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *United States v. Dinwiddie*, 76 F.3d 913, 921 (8th Cir.1996) (quotation omitted). "If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative." *Playboy*, 529 U.S. at 813, 120 S.Ct.

1878. The government bears the burden of proving that any proposed alternatives would not be as effective as the challenged statute. *Reno v. ACLU,* 521 U.S. 844, 874, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997).

1. Compelling Government Purpose

The first question is whether the Ordinance promotes a "compelling government interest." The Supreme Court has noted that "[t]he principal inquiry in determining content neutrality ... is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Ward v. Rock Against Racism,* 491 U.S. 781, 791, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989). The Eighth Circuit has interpreted *Ward* to "instruct reviewing courts to give controlling weight to what the court determines is the government's true purpose for enacting it." *Whitton,* 54 F.3d at 1406. Such a "compelling" interest serves as a higher standard than mere "substantial" state interests. *See Whitton,* 54 F.3d at 1409 (holding that traffic safety and aesthetic beauty are substantial, but not compelling, government interests).

Defendant states that the City's purposes in enacting the statute are to "protect the public health safety, morals, comfort, convenience and general welfare," and to "limit congestion in the public right-of-way." HOPKINS CODE § 515.03 (Intent and Purpose). In *Whitton,* the Eighth Circuit held that "a municipality's asserted interests in traffic safety and aesthetics, while significant, ***have never been held to be compelling***." *Id.* at 1408 (emphasis added; citation omitted) (holding that ordinance's durational restrictions on political signs failed to satisfy strict

scrutiny). The Eighth Circuit had previously held that a city's interests in aesthetics, safety, and property values are substantial, but they are not sufficiently "compelling" to support a content-based restriction that is not the least restrictive alternative. *Gilleo v. City of Ladue*, 986 F.2d 1180, 1181-82, 1183-84 (8th Cir.1993), *aff'd* 512 U.S. 43, 114 S.Ct. 2038, 129 L.Ed.2d 36 (1994).

Plaintiffs have demonstrated a substantial likelihood of success in showing that while the City's proffered intent and interests may be significant, they are not sufficiently compelling to withstand strict scrutiny.

2. Narrowly Tailored; Least Restrictive Means

To survive strict scrutiny, the government bears the burden of showing that the Ordinance is "narrowly tailored" to promote its compelling interest. *Playboy*, 529 U.S. at 813, 120 S.Ct. 1878. Both the Supreme Court and this District have held that a regulation must set forth and follow "definite and objective standards" if government officials are "empowered to limit citizens' ability to express themselves." *Young v. City of Roseville*, 78 F.Supp.2d 970, 975 (D.Minn. 1999) (cataloging cases, including *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990)).

In light of Defendant's stated interests in safety and aesthetics, including sign size, the distinctions provided by the Ordinance (e.g., regarding political signs, governmental signs, civic signs; and distinguishing city groups, governmental agencies, churches, synagogues, schools, golf courses, and country clubs) are not narrowly tailored (or the least restrictive means) to promote that interest. The City

could clearly regulate sign size without regard to a sign's content, or in the parlance of the Ordinance, a sign's "purpose." HOPKINS ZONING CODE § 570.03. If the those content-based distinctions were eliminated from the Ordinance, keeping a globally applicable size-limitation provision or size limitation by zoning district, this might demonstrate a less-restrictive means of achieving the City's interests in safety or aesthetics. But as the Ordinance now stands, Plaintiffs have demonstrated a likelihood of success in demonstrating that the Ordinance is not narrowly tailored to further the City's interests, nor is it the least restrictive means of regulating those interests.

E. *Central Hudson*-Content-Based Regulations of Commercial Speech

Where content-based restrictions apply to commercial speech, courts use the test set forth in *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980). A content-based restriction on commercial speech violates the First Amendment unless that restriction (1) is not unlawful, false, or misleading; (2) seeks to implement a substantial governmental interest; (3) directly advances that interest; and (4) reaches no further than necessary to accomplish that interest. *Central Hudson*, 447 U.S. at 566, 100 S.Ct. 2343. Because it is undisputed that the speech at issue is not unlawful, false, or misleading, and because it is clear that the City has a substantial state interest in traffic safety and aesthetics under *Whitton v. City of Gladstone, Mo.*, 54 F.3d 1400, 1409 (8th Cir.1995) ("while traffic safety and aesthetic beauty are admittedly

substantial interests, they are not compelling governmental interests"), the analysis under *Central Hudson* here is limited to the final two factors.

1. Direct Advancement of Substantial Government Interest

Plaintiffs assert that the City's interest in safety and aesthetics is not substantial, and the Ordinance does not directly advance any such interest. The requirement under *Central Hudson* that the government interest be "substantial" is lower than that required for the strict-scrutiny analysis, outlined above. *See Whitton*, 54 F.3d at 1409 (holding that "while traffic safety and aesthetic beauty are admittedly substantial interests, they are not compelling governmental interests."). *Whitton's* holding that safety and aesthetics are "substantial interests," the Ordinance satisfies the "substantial government interest" prong of the *Central Hudson* analysis.

2. Narrow Tailoring to Substantial Government Interest

To survive constitutional scrutiny, a regulation must also be narrowly tailored to further any such substantial government interest. This narrow tailoring must be "a 'fit' between the legislature's ends and the means chosen to accomplish those ends." *Bd. of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480, 109 S.Ct. 3028, 106 L.Ed.2d 388 (1989) (quotation omitted). A constitutionally acceptable fit is one:

> that is not necessarily perfect, but reasonable; that represents not necessarily the single best

> disposition but one whose scope is in proportion to the interest served; that employs to the least restrictive means but, as we have put it in the other contexts discussed above, a means narrowly tailored to achieve the desired objective.

Id.; see City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 424, 113 S.Ct. 1505, 123 L.Ed.2d 99 (1993) (holding that ordinance prohibiting commercial-handbill distribution not "reasonable fit" to interest in safety and esthetics; its distinction between commercial and non-commercial speech is impermissible means of responding to admittedly legitimate interests because it "bears no relationship *whatsoever* to the particular interests that the city has asserted") (emphasis in original).

Here, the Ordinance at issue states that the its intent and purpose is to "protect the public health safety, morals, comfort, convenience and general welfare," and to "limit congestion in the public right-of-way." HOPKINS CODE § 515.03 (Intent and Purpose). Just as the ordinance in *City of Cincinnati* failed to connect its interests with the distinctions between commercial and non-commercial speech, the City's legitimate interests in orderly development, health, safety, and morals bear no relationship to the Ordinance's distinguishing between political signs, real estate signs, commercial signs, and other content-based distinctions. Hopkins may have believed that its chosen method of regulation furthers a significant governmental interest, but its differing regulations for political, real estate, and commercial signs are not narrowly tailored. Rather, Plaintiffs have demonstrated a substantial likelihood

of success in showing that the City's purposes would be furthered without distinguishing between *types* of speech, as the Ordinance currently stands.

3. Conclusion: *Central Hudson* Test

Because the determination of a sign's duration and size are dependent upon the content of the speech, and because those factors are not related to the City's proffered interests in safety and aesthetics, the Ordinance is not narrowly tailored to further those interests. As such, Plaintiffs have also demonstrated a substantial likelihood of success on the merits with regard to the *Central Hudson* test.

F. Prior Restraint

Plaintiffs next argue that the Ordinance creates an impermissible prior restraint of speech. Requiring a permit to engage in an activity protected by the First Amendment constitutes prior restraint. *Mga Susu v. County of Benton,* 853 F.Supp. 1147, 1151 (D.Minn. 1994). Although courts impose a "heavy presumption" against the validity of any prior restraint, a government may, in some instances, balance competing uses of public forums by imposing permit requirements. *Forsyth County, Ga. v. Nationalist Movement,* 505 U.S. 123, 130, 112 S.Ct. 2395, 120 L.Ed.2d 101 (1992). The degree of safeguards required in such cases depends on whether the sign ordinance is content-based or content-neutral.

A content-neutral regulation requires only "adequate standards to guide the official's decision and render it subject to effective judicial review." *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 323, 122

S.Ct. 775, 151 L.Ed.2d 783 (2002). But a content-based regulation, such as the Ordinance at issue, must meet the following three requirements:

> (1) any restraint prior to judicial review can be imposed only for a specified brief period during which the status quo must be maintained; (2) expeditious judicial review of that decision must be available; and (3) the censor must bear the burden of going to court to suppress the speech and must bear the burden of proof once in court.

Id. (citing *Freedman v. Maryland,* 380 U.S. 51, 58-60, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965)) (quotation omitted). Plaintiffs assert that the Ordinance lacks the second requirement, expeditious judicial review.

1. Prompt Judicial Review

The Ordinance allows persons who disagree with the City's determinations regarding zoning issues to file, within 90 days, an appeal with the Board of Adjustment, which then rules within 60 days, unless a 60-day extension is requested. HOPKINS ZONING CODE § 525.15, subd. 3. If applicants choose to appeal the Board's decision, they may seek review by a Minnesota State District Court, which allows for expedited case assignment. MINN. STAT. § 462.361 (providing for district court's review of municipalities' ordinances, rules, regulations, decisions and orders); *see* MINN. R. GEN. PRAC. 111.02; MINN. R. CIV. APP. P. 118; *City of Littleton, Colo. v. Z.J. Gifts D-4, L.L.C.*, 541 U.S. 774, 781-82, 124 S.Ct. 2219, 159 L.Ed.2d 84 (2004) (finding ordinary rules of court in Colorado, which are similar

to those in Minnesota, assure prompt decision for applicant who seeks judicial review of license denial).

The above binding rules of judicial review, as well as the presumption that "courts are aware of the constitutional need to avoid undue delay resulting in the unconstitutional suppression of protected speech," provides for adequate safeguards in Hopkins ordinance. *See Littleton,* 541 U.S. at 782, 124 S.Ct. 2219 (quotation and modification omitted). As such, Plaintiffs have failed to demonstrate a substantial likelihood of success in showing that the Ordinance lacks the proper procedural safeguards.

G. Equal Protection

Plaintiffs lastly contend that the Ordinance violates equal protection by favoring signs posted by certain businesses and organizations over others, such as Plaintiffs. Under the Equal Protection Clause of the Fourteenth Amendment, which prohibits any state from "deny[ing] to any person within its jurisdiction the equal protection of the laws,""all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.,* 473 U.S. 432, 439, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985) (citation omitted).

To establish a violation of equal protection based on selective enforcement, a plaintiff must ordinarily show that "(1) the person, compared with others similarly situated, was selectively treated; and (2) that such selective treatment was based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person." *LaTrieste Restaurant & Cabaret, Inc. v. Village of Port Chester,* 40 F.3d 587, 590 (2d

Cir.1994) (quotation omitted).

The Ordinance at issue provides exemptions and regulations for undefined civic and city groups, various governmental agencies, churches, synagogues, schools, golf courses, country clubs, apartments, colleges, and health-care centers. HOPKINS ZONING CODE §§ 570.24; 570.46.[1] Plaintiffs persuasively argue that section 570.46 favors, without any justification, the speech of religious non-profit organizations over other non-profit organizations, such as the HCCM, the Elks Club, or the Masons.

"Like other classifications, regulatory distinctions among different kinds of speech may fall afoul of the Equal Protection Clause." *City of Ladue,* 512 U.S. at 51 n. 9, 114 S.Ct. 2038. When confronted with similar ordinance text, another district court has held that

> Granting an exception for temporary signage only when erected by such entities as semi-public agencies, nonprofit organizations, or "permitted clubs", or only in connection with limited and vaguely defined events, shows an impermissible favoritism for certain types of non-commercial speech and certain types of

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[1] Those sections state, in part, "Civic and City groups are allowed temporary signs for city-wide and community events,""Temporary civic signs are a permitted use across the right-of-way on Mainstreet," and Signs may be permitted by Conditional Use Permit for public parks and playgrounds, churches, synagogues, public libraries, public museums, public and parochial schools, municipal buildings, golf course, country clubs, apartment buildings, nursing homes, community centers, colleges, universities and private schools, hospitals, and sanitarium. HOPKINS ZONING CODE §§ 570.24; 570.46.

> speakers and, additionally, ***leaves open the door to abuse of discretion in determinations of who qualifies for the exception.***

Nat'l Adver. Co. v. Town of Babylon, 703 F.Supp. 228, 239 (E.D.N.Y.1989) (emphasis added), *aff'd in part, rev'd in part on other grounds by* 900 F.2d 551 (2d Cir.1990) (holding that exemptions from noncommercial speech restriction "impermissibly discriminates between types of noncommercial speech based upon content"); *see also Metromedia, Inc. v. San Diego,* 453 U.S. 490, 515, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981) ("With respect to noncommercial speech, the city may not choose the appropriate subjects for public discourse.").

Defendant makes the cursory argument that because Advantage's permits were denied due to size restrictions, Plaintiffs cannot show that their signs were selectively rejected in contrast to others similarly situated. But such a demonstration is not necessary where, as here, Plaintiffs mount a facial challenge to the statute. If an ordinance impermissibly interferes with the exercise of a fundamental right, such as the speech rights of certain classes of persons, without being necessary to further a compelling state interest, it violates equal protection. *See Massachusetts v. Murgia,* 427 U.S. 307, 312, 96 S.Ct. 2562, 49 L.Ed.2d 520 (1976).

In light of the above, Plaintiffs have demonstrated a substantial likelihood of success on the merits regarding Equal Protection. Sections 570.24 and 570.46 favor granting permits to churches, synagogues, apartments, and civic organizations-to the exclusion of secular non-profit

organizations like the Elks and non-named religious centers, such as mosques-without providing a compelling state interest in doing so. As such, Plaintiffs have demonstrated a strong likelihood of success regarding their Equal Protection argument.

H. Severability

Defendant makes the final argument that if the Court determines that if any provision of the Ordinance is unconstitutional, then that particular provision could be severed from the whole. Severability of a local ordinance is a question of state law. *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 772, 108 S.Ct. 2138, 100 L.Ed.2d 771 (1988). Minnesota statutes provide guidance on how partial invalidity of a statute should be implemented. MINN. STAT. § 645.20; *see Chanhassen Estates Residents Ass'n v. City of Chanhassen,* 342 N.W.2d 335, 339 n. 3 (Minn.1984) (applying rules of statutory construction to municipal ordinances); *see also Nightclub Mgmt., Ltd. v. City of Cannon Falls,* 95 F.Supp.2d 1027 (D.Minn.2000) (applying section 645.20 to municipal ordinance). Section 645.20 states as follows:

> Unless there is a provision in the law that the provisions shall not be severable, the provisions of all laws shall be severable. If any provision of a law is found to be unconstitutional and void, the ***remaining provisions of the law shall remain valid, unless*** the court finds the valid provisions of the law are so ***essentially and inseparably connected with, and so dependent upon, the void provisions*** that the court cannot

> presume the legislature would have enacted the remaining valid provisions without the void one; or unless the court finds the ***remaining valid provisions, standing alone, are incomplete and are incapable of being executed*** in accordance with the legislative intent.

MINN. STAT. § 645.20 (emphasis added).

Plaintiffs persuasively contend that the challenged content-based regulations (and regulations violating equal protection) are pervasive and are scattered throughout the ordinance, so the few provisions that would remain after severing the offending portions would be incapable of execution. Rather, the Court would have to fill a legislative role by supplying constitutionally sound language, and that remedy is clearly prohibited. *E.g., Chapman v. Comm'r of Revenue,* 651 N.W.2d 825, 836 (Minn.2002) (holding that a court "cannot add language to a statute in order to render it constitutionally permissible").

Removal of the offending sections would render the Ordinance a mere shell of its current construction. Plaintiffs have demonstrated a substantial likelihood of success with regard to the following content-based portions of the Ordinance: §§ 570.01 subd. 8 (business signs), subd. 9 (directional, non-advertising signs), subd. 12 (governmental signs), subd. 13 (monuments), subd. 14 (name plates), subd. 18 (time/temperature signs); 570.03 (permit required); 570.24 (civic signs); 570.27 (political signs); 570.29 (construction signs); 570.37 (real estate signs); 570.39 (promotional signs for housing); 570.43 (signs showing identity of

institutions or housing complex). Similarly, the following sections are impermissibly content-based because they refer to, and necessarily depend upon, the content-based portions above: 570.51 (R districts); 570.53 (B and I districts); and 570.54 (business park district).

If the court were to remove these offending sections of the Ordinance, which comprise a great portion of Section 570, "the remaining valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent." MINN. STAT. § 645.20; *see Chicago & N.W. Ry. Co. v. R.R. & Warehouse Comm'n of Minn.*, 280 F. 387, 400 (D.Minn.1922) (holding that entire statute must fail because invalid portions were "vital" and because of improbability that legislature would have passed statute without the offending portions). Accordingly, the Court concludes that Plaintiffs have demonstrated a substantial likelihood of success that the remainder of the Sign Ordinance, Section 570 of the Hopkins Zoning Code, is unenforceable.

IV. CONCLUSION

Because Plaintiffs have successfully demonstrated the *Dataphase* elements, the Court concludes that a preliminary injunction preventing enforcement of the Section 570 of the Hopkins Zoning Code.

Based upon the files, records, and proceedings herein, **IT IS HEREBY ORDERED** that Plaintiffs' Motion for Preliminary Injunction [Document No. 10] is **GRANTED**.

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NO. 07-1269

FILED
MAY 1 - 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE UNITED STATES SUPREME COURT

ADVANTAGE MEDIA, L.L.C.,

Petitioner,

v.

CITY OF HOPKINS, MINNESOTA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

SUPPLEMENTAL BRIEF OF PETITIONER

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QUESTION PRESENTED

1. Whether a plaintiff who obtains a preliminary injunction barring the continued enforcement of an unconstitutional municipal ordinance, followed by a permanent change in conduct by the municipality, is a prevailing party pursuant to 42 U.S.C. § 1988, even though the plaintiff does not ultimately prevail as to any other claims.

SUPPLEMENTAL BRIEF IN FURTHER SUPPORT OF GRANTING THE PETITION

Pursuant to Supreme Court Rule 15.8, Petitioner Advantage Media, L.L.C. respectfully submits this Supplemental Brief in support of its Petition for Writ of Certiorari in order to bring to the Court's attention recent authority that bolsters the need for review in this case. In *People Against Police Violence v. City of Pittsburg*, 520 F.3d 226, 231-34 (3d Cir. 2008), the Third Circuit found that a plaintiff that obtains a preliminary injunction prohibiting a municipality from enforcing an ordinance, which prompts the municipality to amend its ordinance rather than seek an appeal, is a prevailing party under 42 U.S.C. § 1988. Similarly, in *Dearmore v. City of Garland*, 519 F.3d 517, 523-25 (5th Cir. 2008), the Fifth Circuit held that the party that obtained a preliminary injunction which prompted an amendment to the city code was a prevailing party under Section 1988, even though the case was ultimately dismissed as moot. The results reached in *People Against Police Violence* and *Dearmore* directly contrast with the Eighth Circuit's decision in this case and further illustrate the split among the circuit courts on this important issue. Therefore, Advantage Media's Petition for Writ of Certiorari should be granted.

Advantage Media's Petition argued that review is necessary in this case to allow this Court to clarify whether its decision in *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*, 532 U.S. 598 (2001), stands for the proposition that a party that obtains a judicially sanctioned change in the legal relationship

through the issuance of a court order, followed by a permanent change in the challenged conduct, qualifies as a prevailing party under 42 U.S.C. § 1988. In *Buckhannon*, even though the Court rejected the pure catalyst theory, it held that where a judicially sanctioned change in the legal relationship between the parties occurred, prevailing party status and an award of fees was appropriate. 532 U.S. at 610. In this case, even though the City's passage of a new sign code was a direct result of the district court's issuance of an injunction in favor of Advantage, the Eighth Circuit found that *Buckhannon* did not allow even a very limited award of attorneys' fees to Advantage. (7a-11a).

The recent decisions of the Third and Fifth Circuits came to the opposite conclusion. In *People Against Police Violence*, the Third Circuit affirmed the district court's finding that a plaintiff who obtained an injunction followed by the enactment of a revised ordinance was a prevailing party and due an award of attorneys' fees. 520 F.3d at 231-34. In reaching this conclusion, the Third Circuit relied upon several decisions that Advantage included in its initial petition. *E.g.*, *Select Milk Producers, Inc. v. Johanns*, 400 F.3d 939, 945 (D.C. Cir. 2005); *Watson v. County of Riverside*, 300 F.3d 1092, 1095-96 (9th Cir. 2002); *Dubec v. Green Oak Township*, 312 F.3d 736, 753, 754, n.8 (6th Cir. 2002). The Third Circuit reasoned that under *Buckhannon* the plaintiff was a prevailing party because this was not an instance where the filing of a lawsuit resulted in a voluntary change in conduct, but rather the change was prompted by a court order. 520 F.3d at 233-34.

The Fifth Circuit reached the same conclusion in *Dearmore*. 519 F.3d at 523-25. There, the court

affirmed the district court's award of attorneys' fees to a plaintiff who succeeded in obtaining a preliminary injunction based on the merits that was followed by an amendment to the municipal code. *Id.* at 524. In affirming the lower court's decision, the Fifth Circuit rejected any assertion that the change in conduct was voluntary. The court found, "[t]he City, however, mooted the case *after* and *in direct response to* the district court's preliminary injunction order. There is an obvious direct causal link between the district court's issuance of the preliminary injunction and the City's subsequent amendment of the Ordinance . . . ." *Id.* at 525.

The contrast between the approach taken by the Third and Fifth Circuits and the approach taken by the Eighth Circuit is evident. Advantage obtained a merits-based preliminary injunction preventing the City of Hopkins from continuing to enforce its Sign Ordinance. (34a-47a). In response to the district court's injunction order, the City did not appeal, but rather enacted a revised sign code aimed at correcting all of the provisions found to be unconstitutional by the district court. *E.g.*, Ordinance No. 2005-954 (City acknowledging that code changes resulted from injunction order) (Exh. B to Dkt. No. 26). Nevertheless, the Eighth Circuit found Advantage was not a prevailing party under *Buckhannon* and not entitled to an award of attorneys' fees under 42 U.S.C. § 1988.

Pursuant to the decisions of the Third, Fifth, Ninth, Eleventh, and District of Columbia Circuits, Advantage would have been awarded attorneys' fees. Granting this petition will allow the Court to address this obvious split among the circuit courts on this very important issue.

WHEREFORE, Petitioner Advantage Media, L.L.C. respectfully requests that this Petition be GRANTED.

DATED this 30th day of April, 2008.

Respectfully submitted,

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